89-642

NO. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

COLUMBUS-McKINNON, INC.,
Petitioner

v.

GEARENCH, INC.,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

KENNETH G. ENGERRAND
G. BYRON SIMS
2000 Post Oak Oak Blvd.
Suite 2200
Houston, Texas 77056-4496
Attorneys for Petitioner
Columbus-McKinnon, Inc.

Of Counsel:

BROWN, SIMS, WISE & WHITE

Alpha Law Brief Co., Inc. — 8748 Westpark — Houston, Texas 77063 — 789-2000

QUESTION PRESENTED FOR REVIEW

Whether the provisions of 28 U.S.C. § 1653, permitting amendment of defective allegations of jurisdiction, can also be used to correct the failure to establish jurisdiction of the district court by allowing proof of diversity of citizenship to be introduced for the first time after trial and appeal, on the second remand from the court of appeals.

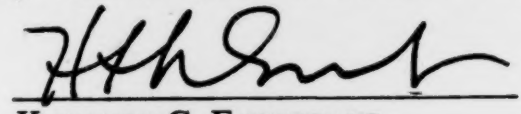
CERTIFICATE OF INTERESTED PERSONS

The undersigned, counsel of record, certifies that the following persons and parties have an interest in the outcome of this case:

1. Petitioner, Columbus-McKinnon, Inc.
2. Respondent, Gearench, Inc.
3. Travelers Insurance Company
4. Mission Insurance Company
5. Kenneth G. Engerrand, G. Byron Sims, and Brown, Sims, Wise & White, counsel for Petitioner, Columbus-McKinnon, Inc.
6. Jeffrey A. Rhoades and Davidson, Meaux, Sonnier & McElligott, counsel for Respondent, Gearench, Inc.

Additional parties below were:

7. Plaintiffs, Bess Caroline Molett, John Dreisch Molett, IV, Pamela H. Landry, Nicholas Ross Landry and Mark James Landry
8. Defendants, Penrod Drilling Company, Marathon LeTourneau, Inc., Armco Steel Company, Superior Derrick Services, Inc., Kulkoni, Inc., and Aetna Life & Casualty Company and/or Aetna Casualty & Surety Company
9. Intervenors and Third-Party Defendants, McBroom Rig Building Services, Inc., The North River Insurance Company and International Surplus Lines Insurance Company
10. Third-Party Defendants, Taisho Marine & Fire Insurance Company, Naniwa Tekko K.K., and K-M International



KENNETH G. ENGERRAND
Attorney for
Columbus-McKinnon, Inc.

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NO. _____

IN THE

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OCTOBER TERM, 1989

COLUMBUS-McKINNON, INC.,
Petitioner

v.

GEARENCH, INC.,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

OPINIONS BELOW

The initial opinion of the district court (Findings of Fact and Conclusions of Law) was signed on July 30, 1986 and is printed here as Appendix G. The initial judgment of the district court was signed on September 3, 1986 and is printed here as Appendix F.

The initial opinion of the court of appeals, affirming the judgment of the district court but remanding the case for specific findings on the reasonableness of the amount of the settlement, dated September 15, 1987, is reported at 826 F.2d 1419 and is printed here as Appendix E.

The district court's Memorandum Ruling and Judgment on remand, signed on February 8, 1988, are printed here as Appendix D and Appendix C.

The opinion of the court of appeals on the second appeal, vacating the district court's judgment and remanding the case to the district court to ascertain the existence of diversity jurisdiction, dated May 19, 1989, is reported at 872 F.2d 1221 and is printed here as Appendix B. The opinion of the court of appeals, denying petitions for rehearing and a suggestion for rehearing en banc, dated July 20, 1989, is reported at 878 F.2d 829 and is printed here as Appendix A.

JURISDICTION

The opinion of the court of appeals was made and entered on May 19, 1989. The timely petitions for rehearing and suggestion for rehearing en banc were denied on July 20, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

This case involves the interpretation of 28 U.S.C. § 1653:

> Defective allegations of jurisdiction may be amended, upon terms, in the trial or appellate courts.

This case also involves the issue of proof of jurisdiction under 28 U.S.C. § 1332. The pertinent portions of that Statute at all times material to this suit are:

> (a) The district courts shall have original jurisdiction of all civil actions where the matter in contro-

versy exceeds the sum or value of $10,000, exclusive of interest and costs, and is between—

(1) citizens of different States;

(2) citizens of a State and citizens or subjects of a foreign state;

(3) citizens of different States and in which citizens or subjects of a foreign state are additional parties; and

(4) a foreign state, defined in section 1603(a) of this title, as plaintiff and citizens of a State or of different States.

* * *

(c) For the purposes of this section and section 1441 of this title, a corporation shall be deemed a citizen of any State by which it has been incorporated and of a State where it has its principal place of business: *Provided further,* That in any direct action against the insurer of a policy or contract of liability insurance, whether incorporated or unincorporated, to which action the insured is not joined as a party-defendant, such insurer shall be deemed a citizen of the State of which the insured is a citizen, as well as of any State by which the insurer has been incorporated and of the State where it has its principal place of business.

STATEMENT OF THE CASE

This case began as an action brought by the survivors of two rig builders who were killed during the construction of the derrick of a jack-up drilling rig. The Plaintiffs brought suit in the United States District Court for the Western District of Louisiana against various Defendants, alleging diversity jurisdiction of the court. In the alterna-

tive, the Plaintiffs alleged that their action fell within the admiralty jurisdiction of the district court. The court of appeals correctly held that the Plaintiffs' allegations of diversity jurisdiction were "defective because they do not identify the states of incorporation of the defendant corporations or their principal places of business." (App. B-14, 872 F.2d at 1227). Further, all of the Defendants named in the Plaintiffs' complaint filed answers denying the Plaintiffs' allegations of jurisdiction.

The Plaintiffs amended their complaint four times to add and drop Defendants "sporadically throughout the litigation prior to the final judgment." (App. B-14-15; 872 F.2d at 1227). The allegations in each of the amended pleadings were conclusory and failed to allege diversity properly between the Plaintiffs and Defendants. All of the Defendants named in the amended pleadings likewise filed answers denying the Plaintiffs' allegations of jurisdiction. The answers filed by defendant Gearench challenged the jurisdiction of the court in two ways: first, Gearench denied the allegations of jurisdiction made by the Plaintiffs and second, Gearench asserted the specific defense that "this court lacks jurisdiction in the premises."

In addition to its two-pronged attack on the subject matter jurisdiction of the court, defendant Gearench brought third-party claims and cross claims against various parties. Gearench brought Columbus-McKinnon into the suit as a third-party defendant seeking indemnity or contribution. Gearench alleged no jurisdictional basis for its third-party action against Columbus-McKinnon.

After the amendments to the Plaintiffs' complaint, adding and deleting various Defendants, the Plaintiffs dropped their contention of diversity jurisdiction and

proceeded to trial on the basis stated in the Pretrial Stipulations: "General Maritime Law, pendent state claims asserted by plaintiffs v. various defendants." (Pretrial Stipulations, p. 2). Several parties, including Columbus-McKinnon, continued to contest the claim of admiralty jurisdiction in both pretrial and post-trial briefs. In fact, the Pretrial Stipulations, signed by attorneys for all of the parties, specifically listed the only remaining basis for jurisdiction as a contested issue of law: "Whether the court's admiralty jurisdiction extends to the claims brought by plaintiffs." (Pretrial Stipulations, contested issue of law number 9, p. 19).

The case proceeded to trial, but during jury deliberations the Plaintiffs reached a settlement with defendant Gearench in the amount of $2,000,000. Gearench reserved the right to seek indemnity from third-party defendant Columbus-McKinnon and cross-defendant Penrod Drilling Company. The district court then dismissed the Plaintiffs' claims with prejudice, dismissed Gearench's claims against Penrod on the merits, and granted Gearench indemnity against Columbus-McKinnon for the amount Gearench paid the Plaintiffs in settlement. (App. F-1; App. G-4-5).

Columbus-McKinnon appealed to the United States Court of Appeals for the Fifth Circuit, and the court agreed with Columbus-McKinnon that "the accident in this case is insufficiently connected to traditional maritime activity to invoke admiralty jurisdiction." (App. E-17; 826 F.2d at 1428). Applying state law, the court of appeals remanded the case to the district court "for specific findings on the reasonableness of the amount of the settlement." (App. E-23; 826 F.2d at 1430).

On remand, the district court found that the settlement was reasonable (App. C-1; App. D-4), and Columbus-McKinnon again appealed to the United States Court of Appeals for the Fifth Circuit. The court of appeals held: 1) the district court did not have admiralty jurisdiction over any of the Plaintiffs' claims; 2) the Plaintiffs did not properly plead diversity jurisdiction; and 3) proof of diversity jurisdiction was not clear from the record. The judgment of the district court was vacated and the case was remanded "to ascertain the existence of diversity jurisdiction." (App. B-18; 872 F.2d at 1229). The court of appeals stated that defendant Gearench could both amend the allegations of diversity *and* supplement the record with proof of diversity. (App. B-16; 872 F.2d at 1228).

Columbus-McKinnon seeks review of the holding of the court of appeals permitting amendment of the pleadings and introduction of evidence on remand. As the Plaintiffs' allegations of jurisdiction were challenged by all of the Defendants, the party asserting jurisdiction (Gearench) had the burden at trial of supporting the allegations of jurisdiction with competent proof. Because it failed to carry its burden of eliciting the facts to establish jurisdiction, Gearench is precluded from amending the pleadings and introducing additional evidence on remand. Thus, pursuant to Supreme Court Rule 21.1(i), Petitioner, Columbus-McKinnon, Inc., contends that the bases asserted for jurisdiction of the district court, admiralty under 28 U.S.C. § 1333 and diversity of citizenship under 28 U.S.C. § 1332, did not exist and the district court was without jurisdiction.

REASONS FOR GRANTING THE WRIT

Whether the provisions of 28 U.S.C. § 1653, permitting amendment of defective allegations of jurisdiction, can also be used to correct the failure to establish jurisdiction of the district court by allowing proof of diversity of citizenship to be introduced for the first time after trial and appeal, on the second remand from the court of appeals.

This case involves an unwarranted expansion of the diversity jurisdiction of the district court together with an untenable construction of the provisions of 28 U.S.C. § 1653. Despite the fact that Gearench had the burden of establishing jurisdiction in this case, and despite the fact that jurisdiction was a contested issue in the district court, Gearench made no effort to plead jurisdiction or to offer any evidence in support of the jurisdiction of the district court. Nevertheless, the court of appeals remanded the case to the district court to permit an amendment of the pleadings and the introduction of evidence of diversity of citizenship, citing 28 U.S.C. § 1653. This holding conflicts directly with the decisions of this Court addressing proof of diversity jurisdiction, the language of 28 U.S.C. § 1653, and the interpretation of that Statute by this Court.

1. The Statute permits correcting defective pleadings, not the failure to introduce evidence.

The suit filed by the Plaintiffs alleged diversity of citizenship as a basis for the jurisdiction of the district court. 28 U.S.C. § 1332. In the alternative, the Plaintiffs alleged admiralty jurisdiction. 28 U.S.C. § 1333. After all of the Defendants filed answers challenging the juris-

dictional allegations, the parties stopped asserting diversity as a basis for jurisdiction and proceeded to trial on the basis stated in the Pretrial Stipulations: "General Maritime Law, pendent state claims asserted by plaintiffs v. various defendants." This sole basis for jurisdiction was also stipulated by the parties to be a contested issue of law: "Whether the court's admiralty and maritime jurisdiction extends to the claims brought by plaintiffs." (Pretrial Stipulations, contested issue of law number 9). Thus, Gearench, which sought relief as a third-party plaintiff, was content to try the case based solely on admiralty jurisdiction, knowing that it was a contested issue in the case.

The two opinions of the court of appeals demonstrate that Gearench's decision to rely on admiralty jurisdiction was a mistake. The first opinion resolved the question of admiralty jurisdiction over some claims by holding that the third-party product liability claims in the case are insufficiently connected to traditional maritime activity to invoke the admiralty jurisdiction of the court. (App. E-13-17; 826 F.2d at 1426-28). The second opinion held that there is no admiralty jurisdiction over the remaining claims. (App. B-6-13; 872 F.2d at 1224-26). Thus, there is no basis for admiralty jurisdiction in this case.

When it became clear that the jurisdictional basis on which the case was tried (admiralty) was unavailable, the court of appeals looked to alternative bases for jurisdiction. The conclusory allegations of diversity in the Plaintiffs' pleadings were defective because they did not attempt to identify the states of incorporation of the defendant corporations or the states of their principal places of business. (App. B-14; 872 F.2d at 1227). Further, the Plaintiffs sporadically added and dropped Defendants throughout the litigation without bothering to

determine their citizenship or plead their citizenship properly. *Id.* The court of appeals could not ascertain from the record and briefs whether the various Defendants were of diverse citizenship from the Plaintiffs and, in fact, Gearench does not contend that complete diversity of the parties was shown. Gearench stated in its brief to the court of appeals: "Admittedly, citizenship of all defendants was not affirmatively established." (Gearench's Brief at 10, No. 88-4136).

After oral argument, counsel for Gearench noted that the court of appeals "was obviously concerned about the issue of diversity jurisdiction and the possible solutions to the apparent lack of evidence in the record." (Letter to the court dated October 12, 1988 from Gearench's counsel, Jeffrey A. Rhoades, p. 1). He suggested that "any deficiencies as to allegations or proof can be cured without the necessity of dismissing the case." *Id.*

The court of appeals accepted Gearench's suggestion. The court of appeals cited 28 U.S.C. § 1653 which provides: "Defective allegations of jurisdiction may be amended, upon terms, in the trial or appellate courts." The court of appeals did not, however, merely follow the language of the Statute which permits amendment of defective allegations of jurisdiction. Instead, the court of appeals went further and noted that proof of jurisdiction was not clear from the record. The court of appeals then permitted a remand of the case to the district court both for amendment of the allegations *and* for the record to be supplemented with the introduction of evidence of diversity of citizenship. (App. B-16; 872 F.2d at 1228). This construction of the Statute not only misinterprets its language, but also runs afoul of the clear holding of

this court in *Newman-Green, Inc. v. Alfonzo-Larrain*, 109 S. Ct. 2218 (1989).[1]

This Court explained in *Newman-Green* that section 1653 speaks only of amending *allegations* of jurisdiction and may not be used to correct defective jurisdiction facts. *Id.* at 2222. Under the holding in *Newman-Green*, an amendment on appeal would have been proper in the case at bar if the parties had introduced sufficient facts to support jurisdiction but merely failed to plead jurisdiction properly. Had Gearench offered evidence at trial of the diverse citizenship of the parties, then an amendment would be permissible under section 1653 to conform the pleadings to the proof. In the case at bar, however, there was no proof of jurisdiction. Gearench was content to try the case based on admiralty jurisdiction, the existence of which was stipulated to be a contested issue. Now that the issue of admiralty jurisdiction has been resolved against Gearench's position, Gearench seeks a second bite at the apple to do what it should have done in the first place—attempt to plead and prove the jurisdiction of the court based on diversity of citizenship.

As the party asserting jurisdiction, Gearench had the burden of eliciting facts to support the jurisdiction of the court. *McNutt v. General Motors Acceptance Corp.*, 298 U.S. 178, 189 (1936). Gearench wholly failed to carry this burden of proof, and neither this Court nor Congress has sanctioned a remand of the case to litigate for the first time an issue that should have been resolved

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1. In its opinion denying Columbus-McKinnon's petition for rehearing, the court of appeals acknowledged the conflict between its holding and the opinion of this Court in *Newman-Green:*

> *See,* however, *Newman-Green, Inc. v. Alfonzo-Larrain,* ____ U.S.____, 109 S. Ct. 2218, 104 L.Ed.2d 893 (1989) regarding the scope of 28 U.S.C. § 1653, which allows courts to cure defective diversity allegations.

(App. A-2; 878 F.2d at 830).

at trial. Federal courts are courts of limited jurisdiction. The failure either to plead or prove jurisdiction leaves the court without any basis for assuming jurisdiction. Section 1653 cannot be used to cure defective jurisdictional facts, and it certainly cannot be used as a substitute for nonexistent proof.

2. The jurisdiction of the district court must be determined on the facts presented at trial.

The court of appeals justified its decision to remand the case for pleading and proof of diversity facts by stating that "Gearench had no notice, nor should it be charged with any notice, of a defect in jurisdiction prior to this second appeal." (App. B-17; 872 F.2d at 1228). The court concluded that "the diversity of the parties was never materially at issue." *Id.* Aside from the fact that the provisions of 28 U.S.C. § 1653 do not support this ruling, the holding of the court of appeals is directly contrary to the decisions of this Court in *McNutt v. General Motors Acceptance Corp.*, 298 U.S. 178 (1936); *KVOS, Inc. v. Associated Press*, 299 U.S. 269 (1936); and *North Pacific Steamship Co. v. Soley*, 257 U.S. 216 (1921). These cases require the party asserting jurisdiction to support the allegations of jurisdiction *with proof* when the allegations are challenged in the answer or in any other appropriate manner.

In *McNutt* the Defendant appealed an injunction granted by the district court in a case brought under its diversity jurisdiction. The Plaintiff's allegations supporting jurisdiction were denied in the Defendant's answer. This Court stated:

> If his allegations of jurisdictional facts are challenged by his adversary in any appropriate manner, he must support them by competent proof.

298 U.S. at 189. As the allegation of jurisdiction was "traversed *by the answer*" and as there was "no showing that the District Court had jurisdiction," this Court concluded that "the bill should have been dismissed." *Id.* at 190 (emphasis added).

This Court also held that the action must be dismissed for want of proof of jurisdiction facts in *North Pacific Steamship Co. v. Soley*, 257 U.S. 216 (1921). The Court stated:

> In the present case the issue was raised by answer, and, therefore, it became necessary for the court to determine the question of jurisdiction upon the facts presented; and, when brought directly here, it is the duty of this court to review the decision upon the testimony as one presenting a jurisdictional question.

257 U.S. at 221. As long as the allegation of jurisdiction is "challenged in appropriate manner," and "no sufficient evidence" is offered to support the jurisdiction of the court, the complaint must be dismissed for want of jurisdiction. *KVOS, Inc. v. Associated Press*, 299 U.S. 269, 280 (1936).

The decisions of this Court make it clear that when the allegations of jurisdiction are denied in the answer, it is incumbent on the party seeking jurisdiction to "support them by competent proof" and the question of jurisdiction is reviewed "upon the facts presented." *McNutt*, 298 U.S. at 189; *Soley*, 257 U.S. at 221. Where there is insufficient proof of jurisdiction, after the allegations of jurisdiction are denied in the answer, the case must be dismissed, not remanded for repleading and additional proof.

In the case at bar, the allegations of jurisdiction were denied in *twenty-two* answers, including the answers of *every* Defendant and including the several answers filed by defendant Gearench. Under *McNutt, Soley* and *KVOS,* however, because it sought relief as a third-party plaintiff, Gearench was obligated to introduce proof of jurisdiction or suffer a dismissal of its claim. The court of appeals consequently erred when it stated: "the diversity of the parties was never materially at issue." (App. B-17; 872 F.2d at 1228). As the allegations were denied in the answers of *every* Defendant, including the answers filed by Gearench, the jurisdiction of the court *was* materially at issue, as this Court stated in *McNutt, Soley* and *KVOS.*

If twenty-two denials of jurisdiction were not sufficient to give Gearench notice that jurisdiction was an issue in the case, then the Pretrial Stipulations surely were sufficient. Gearench, which was asserting third-party claims and cross claims seeking indemnity, had the burden of establishing the jurisdiction of the court in order to prevail on its claim. Gearench made the decision to rely solely on admiralty and pendent jurisdiction, as reflected in the Pretrial Stipulations, even though this basis for jurisdiction was stipulated to be contested. When the court of appeals ruled against Gearench on the admiralty jurisdiction issue, Gearench realized the mistake of basing its claim solely on admiralty jurisdiction and then sought to resurrect diversity jurisdiction. Diversity was not listed as a basis for jurisdiction in the Pretrial Stipulations, there was never any proper pleading of diversity, and no attempt was ever made to introduce evidence of diversity of citizenship. The only allegations related to diversity had been denied by every Defendant including Gearench.

With no proper pleading or proof of diversity, and with the jurisdiction of the court contested in every Defendant's answer as well as in motions, briefs and in the Pretrial Stipulations, it is inappropriate to allow Gearench to attempt to plead and prove diversity for the first time on a second remand of the case. Gearench was obligated to establish jurisdiction if it sought to prevail on its third-party claim. Gearench failed to carry its burden of proof and the court was consequently without jurisdiction to proceed to judgment.

The rule requiring dismissal of the case when jurisdiction does not appear in the record is "inflexible and without exception:"

> [T]he rule, springing from the nature and limits of the judicial power of the United States, is inflexible and without exception, which requires this court, of its own motion, to deny its own jurisdiction and, in the exercise of its appellate power, that of all other courts of the United States, in all cases where such jurisdiction does not affirmatively appear in the record on which, in the exercise of that power, it is called to act.

Mansfield, C. & L.M. Ry. v. Swan, 111 U.S. 379, 382 (1884). The jurisdiction of the court does not "affirmatively appear in the record," and application of this inflexible rule therefore requires dismissal of the case because of the failure of Gearench to establish jurisdiction. It is too late for Gearench, which chose to rest its claim on admiralty jurisdiction, to seek a second bite at the apple after losing on that issue. It is "the duty of the court to proceed no further with the case." *Soley,* 257 U.S. at 223.

CONCLUSION

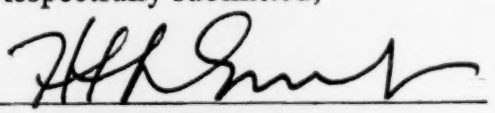
Columbus-McKinnon respectfully submits that the court of appeals has misconstrued the provisions of 28 U.S.C. § 1653 and has set a course for determining jurisdiction questions which is a radical departure from the precedents of this Court. The court of appeals has turned on its head the rule that the party asserting jurisdiction has the burden of proving jurisdiction. A party may now try his case on one theory and, if unsuccessful, obtain a second chance to plead and prove a different theory.

In this case Gearench and the other Defendants repeatedly challenged the jurisdiction of the court. Jurisdiction was challenged throughout the course of the case, beginning with the initial answers, continuing with the pretrial motions and the Pretrial Stipulations, and finally being addressed after trial in the post-trial briefs. At the same time Gearench challenged the jurisdiction of the court in its answers, Gearench sought relief from the court by filing a third-party claim against Columbus-McKinnon. Gearench failed, however, to invoke the jurisdiction of the court over its claim by pleading or proving any basis for jurisdiction.

Federal courts are courts of limited jurisdiction. The court is required "to determine the question of jurisdiction on the facts presented." *Soley,* 257 U.S. at 221. As no facts were introduced to support jurisdiction, the case must be dismissed.

Wherefore, Columbus-McKinnon respectfully prays that this Honorable Court grant this petition for a writ of certiorari.

Respectfully submitted,



KENNETH G. ENGERRAND
G. BYRON SIMS
2000 Post Oak Oak Blvd.
Suite 2200
Houston, Texas 77056-4496

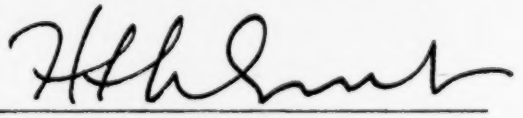
Attorneys for Petitioner
Columbus-McKinnon, Inc.

Of Counsel:

BROWN, SIMS, WISE & WHITE

CERTIFICATE OF SERVICE

I hereby certify that three true and correct copies of the above and foregoing Petition for a Writ of Certiorari have been forwarded to Mr. Jeffrey A. Rhodes by certified mail, return receipt requested, on this the 17 day of October, 1989.



KENNETH G. ENGERRAND

APPENDICES

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APPENDIX A

Bess Caroline MOLETT, Individually and on Behalf of her minor son, John Dreisch Molett, IV, et al.,
Plaintiffs,

v.

PENROD DRILLING CO., et al.,
Defendants.

and

GEARENCH, INC.,
Defendant-Third Party Plaintiff-Appellee,

v.

COLUMBUS-McKINNON, INC.,
Third Party Defendant-Appellant.

No. 88-4136.

United States Court of Appeals,
Fifth Circuit.

July 20, 1989.

Kenneth G. Engerrand, G. Byron Sims, Houston, Tex., for third-party defendant-appellant.

Jeffrey Rhoades, Lafayette, La., for Gearench, Inc.

Appeal from the United States District Court for the Western District of Louisiana; John M. Duhe, Jr., Judge.

ON PETITIONS FOR REHEARING AND
SUGGESTION FOR REHEARING EN BANC

(Opinion May 19, 5th Cir., 1989, 872 F.2d 1221)

Before THORNBERRY, KING, and JONES, Circuit Judges.

PER CURIAM:

The Petitions for Rehearing are DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestions for Rehearing En Banc are DENIED.

See, however, *Newman-Green, Inc. v. Alfonzo-Larrain,* ____U.S.____, 109 S. Ct. 2218, 104 L.Ed.2d 893 (1989) regarding the scope of 28 U.S.C. § 1653, which allows courts to cure defective diversity allegations.

APPENDIX B

Bess Caroline MOLETT, Individually and on Behalf of her minor son, John Dreisch Molett, IV, et al.,
Plaintiffs,

v.

PENROD DRILLING CO., et al.,
Defendants.

GEARENCH, INC.,
Defendant-Third Party Plaintiff-Appellee,

v.

COLUMBUS-McKINNON, INC.,
Third Party Defendant-Appellant.

No. 88-4136.

United States Court of Appeals,
Fifth Circuit.

May 19, 1989.

Kenneth G. Engerrand, G. Byron Sims, Houston, Tex., for third party defendant-appellant.

Jeffrey Rhoades, Lafayette, La., for Gearench, Inc.

Appeal from the United States District Court for the Western District of Louisiana.

Before THORNBERRY, KING, and JONES, Circuit Judges.

PER CURIAM:

This is an appeal from the remand of this case after our opinion in *Molett v. Penrod Drilling Co.*, 826 F.2d 1419 (5th Cir. 1987) (*Molett I*). At issue for the first time in the litigation is the jurisdiction of the federal courts to adjudicate a claim for indemnity between a defendant and third-party defendant. We conclude that we lack admiralty jurisdiction over the claim in question, but we remand to the district court to allow the third-party plaintiff to amend its complaint to attempt to cure a defect in the allegations of diversity jurisdiction.

BACKGROUND

On January 27, 1983, John Molett, III and Harold E. Landry were killed in an accidental fall while constructing the derrick on a jack-up barge owned by Penrod Drilling Company (Penrod).[1] The rig had been in construction near Vicksburg, Mississippi, but the derrick had to be completed at Belle Chasse, Louisiana, since it otherwise would have been too tall to pass under bridges between Vicksburg and the Gulf of Mexico. Therefore, the contractor had the rig towed to Belle Chasse and subcontracted with McBroom Rig Builders, Inc. (McBroom), who employed Molett and Landry, to finish the derrick.

To lift materials to the top of the derrick, Penrod had fabricated a "gin pole." The forty-foot pole was equipped with pulleys and other tackle with one end anchored to the derrick so that the upper end of the pole could be suspended leaning away from the derrick structure and used as a portable stiff-leg crane. It was necessary from

1. The description of the background of this litigation borrows heavily from our earlier opinion in *Molett I*. 826 F.2d at 1421-23.

time to time to "jump" the gin pole farther up the derrick so that materials could be lifted higher.

On the day of the accident, Molett and Landry were standing on a scaffold 147 feet above the rig floor waiting for the gin pole to be raised. As the lift was attempted, the gin pole suddenly broke loose and fell, hitting the scaffold on which the men were standing and sending them and most of their equipment tumbling to the rig floor. In violation of state, federal, and company safety regulations, neither man was wearing a safety line when the accident occurred.

After the accident, McBroom employees discovered a chain still hanging from the top derrick beam, almost entirely unwound and missing one hook, and the snatch block intact on the rig floor. The missing hook and any remnant of chain that may have been attached to it were never recovered, evidently having fallen into the river.

The survivors of Molett and Landry brought wrongful death actions against Penrod and other companies believed to be the manufacturers of the chain and hook used to lift the gin pole when the accident occurred.[2] Ultimately, it was discovered that the chain bore the trademark of Gearench, Inc., and that the hook was manufactured by Kulkoni, Inc. The complaint was therefore amended to name those companies as defendants guilty of manufacturing defective products. Thereafter, Gearench filed a third-party demand against Columbus-McKinnon, Inc., contending that Columbus-McKinnon had actually manufactured the allegedly defective chain and that Gearench had not contributed in any way to any defect that might have existed. Gearench also sought

2. The contractor and other parties were also named in the suit.

contribution from Penrod for any liability imposed against it.

The case was tried before a jury. On the fourth day of trial, during jury deliberations, Gearench settled with the plaintiff families, paying $1 million to each. While counsel were informing the court of the settlement agreement, the jury sent notice that it had reached a verdict. The trial judge announced that, because a settlement had been reached, he would decide Gearench's third-party claim for indemnity and contribution against Columbus-McKinnon and Penrod. None of the parties objected, and, in the presence of counsel, the judge discharged the jury without obtaining their verdict. The trial judge then proceeded—after argument and briefing—to decide the remaining issues.

The district court held that the gin pole fell because the chain by which it had been suspended broke. Although Gearench had sold the chain under its trademark as its own product, the court found that the chain had actually been manufactured by Columbus-McKinnon, that it was unreasonably dangerous in normal use (hence defective), and that the defect caused the accident. The court concluded further that Gearench was unaware of the defect and in no way caused or contributed to the problem. Similarly, Penrod was found blameless for the fact that McBroom employees were working on its vessel without safety lines.

In its conclusions of law, the district court held that Gearench's third-party demand against Penrod for indemnity or contribution was governed by 33 U.S.C. § 905(b) of the Longshore and Harbor Workers' Com-

pensation Act (LHWCA)[3] and that Gearench failed to establish that Penrod had actual knowledge of a dangerous condition leading to the decedents' deaths or was aware that McBroom was unreasonably failing to protect its employees from such a condition.[4] *It therefore rejected Gearench's claim against Penrod.*

The court next concluded that Columbus-McKinnon, as the actual manufacturer of a defective product that caused the deaths, was strictly liable in tort for the damages under either Louisiana or maritime law. Consequently, Gearench was entitled to indemnity from Columbus-McKinnon. The court did not rule on the reasonableness of the amount paid in settlement.

In *Molett I,* Columbus-McKinnon appealed from the indemnity judgment against it. Gearench appealed from the judgment denying indemnity and contribution from Penrod only to the extent that this Court did not uphold its right to full indemnity from Columbus-McKinnon. We held that Gearench's claim for indemnity or contribution against Columbus-McKinnon was not governed by maritime law because that claim lacked any traditional maritime flavor. 826 F.2d at 1428. However, the Court upheld Gearench's right to indemnity from Columbus-McKinnon under Louisiana law and remanded the case only for findings of fact regarding the reasonableness of the settlement under Louisiana law. 826 F.2d at 1428-29.

On remand, the district court determined that the full amount of the settlement was reasonable. Columbus-

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3. 33 U.S.C. §§ 901-950 (1982).

4. See *Scindia Steam Navigation Co., Ltd. v. De Los Santos,* 451 U.S. 156, 101 S. Ct. 1614, 68 L.Ed.2d 1 (1981); *Helaire v. Mobil Oil Co.,* 709 F.2d 1031, 1035-40 (5th Cir. 1983).

McKinnon now appeals from the judgment on remand contending: (1) that the federal courts lack jurisdiction since diversity of citizenship was never proven and admiralty jurisdiction was rejected in *Molett I;* (2) that the district court made insufficient findings of fact to support the reasonableness of the settlement award; and (3) that it should not be liable for indemnity because Gearench did not raise the defense of prescription below and did not make a tender of defense until after the settlement was reached. Columbus-McKinnon never contested the federal court's jurisdiction initially or on remand to the district court, or when it appeared previously before this court.

Jurisdiction is the key question before us. There are two paths to jurisdiction over the indemnity case on remand. The first would trace from the original plaintiffs' claims and would be predicated on admiralty or diversity in their original action. The second finds diversity between Gearench and Columbus-McKinnon, the admiralty nature of their dispute having previously been ruled out by *Molett I.* We shall address the theories in this order.

I. ADMIRALTY JURISDICTION

This Court might assert jurisdiction over Gearench's indemnity claim if: (1) the district court had admiralty jurisdiction over plaintiffs' claims against Penrod, and (2) plaintiffs' claims against Gearench, though not admiralty based, were nevertheless within the district court's pendent jurisdiction, and (3) Gearench's third-party claim against Columbus-McKinnon was within the district court's ancillary jurisdiction. We do not here venture beyond the first of these conjunctive steps.

The plaintiffs' original complaint alleges in part that Penrod was liable for fabricating the derrick so as to require an unsafe method of erection; failing to design the derrick so that it could be safely assembled; furnishing improper or defective equipment, the gin pole; and allowing an improper and negligent method of assembly of the derrick to occur. Jurisdiction was asserted under 28 U.S.C. § 1333 and 33 U.S.C. § 905(b) of the LHWCA. These claims were not specifically at bar when the court in *Molett I* held that the plaintiffs' products liability claim against the chain manufacturer and Gearench's related claim for indemnity were not maritime torts. We must therefore decide whether the plaintiffs' § 905(b) claim against Penrod is sufficient to invoke this court's admiralty jurisdiction.

Guided by the Supreme Court's holdings in *Executive Jet Aviation v. City of Cleveland,* 409 U.S. 249, 93 S. Ct. 493, 34 L.Ed.2d 454 (1972) and *Foremost Insurance Co. v. Richardson,* 457 U.S. 668, 102 S. Ct. 2654, 73 L.Ed.2d 300 (1982), this Circuit applies a two-part inquiry to determine the existence of maritime jurisdiction. "That inquiry is essentially fact-bound, turning on a determination of the location of the tort, the situs factor, and the pertinent activity, the nexus factor." *Richendollar v. Diamond M. Drilling Co.,* 819 F.2d 124, 127 (5th Cir. 1987) (en banc). Because Molett's and Landry's deaths occurred on navigable waters, only the nexus prong must be satisfied here.

To satisfy the nexus factor, the "wrong [must] bear a significant relationship to traditional maritime activity." *Executive Jet,* 409 U.S. at 268, 93 S. Ct. at 504. In *Kelly v. Smith,* 485 F.2d 520 (5th Cir. 1973),

cert. denied, 416 U.S. 969, 94 S. Ct. 1991, 40 L.Ed.2d 558 (1974), this court outlined four factors to consider in assessing whether the nexus requirement has been met: (1) the functions and roles of the parties, (2) the types of vehicles and instrumentalities involved; (3) the causation and type of injury; and (4) traditional concepts of the role of admiralty law. *Id.* at 525. Before analyzing the present "wrong" in light of these factors, we pause to review case law from this circuit addressing maritime jurisdiction over claims arising from injuries sustained on vessels under construction.

Relying on *Lundy v. Litton Systems, Inc.,* 624 F.2d 590 (5th Cir. 1980), *reh'g denied,* 629 F.2d 1349, *cert. denied,* 450 U.S. 913, 101 S. Ct. 1353, 67 L.Ed.2d 337 (1981) and legislative history, this court concluded that a claim properly stated under 33 U.S.C. § 905(b) of LHWCA constituted an implicit finding of admiralty jurisdiction. *Hall v. Hvide Hull No. 3,* 746 F.2d 294, 300 (5th Cir. 1984), *reh'g denied,* 753 F.2d 1075 (1985) (en banc). The difficult question in *Hall* and *Lundy* was whether a partially constructed vessel floating in navigable waters constituted a vessel under LHWCA and was therefore sufficient to form the basis of a § 905(b) claim. In *Hall,* once vessel status was determined, a finding of maritime jurisdiction immediately followed.

We have since rejected the notion that merely stating a § 905(b) claim is sufficient to establish maritime jurisdiction. *See Richendollar,* 819 F.2d at 125. Following *Richendollar* and *May v. Transworld Drilling Co.,* 786 F.2d 1261, 1263 (5th Cir.), *cert. denied,* 479 U.S. 854, 107 S. Ct. 190, 93 L.Ed.2d 123 (1986), our circuit clearly requires that maritime jurisdiction be satisfied in

addition to establishing a § 905(b) claim. Thus, unlike the jurisdictional analysis in *Hall* which focused on vessel status under LHWCA, after *Richendollar* "the configuration of the watercraft is of secondary importance." Maritime jurisdiction can only be established by satisfying *Executive Jet's* two-part situs and nexus requirement. *Hall* and *Lundy* are therefore no longer viable precedents with regard to jurisdiction.

By contrast, this court's decision in *Lowe v. Ingalls Shipbuilding, Inc.*, 723 F.2d 1173 (5th Cir. 1984) remains unscathed by *Richendollar*. The question in *Lowe* was whether a shipyard employer could establish an independent claim for indemnity against an asbestos manufacturer. Before reaching this issue, the court *sua sponte* determined that subject matter jurisdiction was lacking. In dismissing maritime jurisdiction as a possible jurisdictional basis, the court focused on *Executive Jet's* nexus or maritime activity factor. The court concluded that "[i]t has long been held that . . . ship construction is [not] a maritime activity" even if the incomplete vessel is lying in navigable waters. *Lowe*, 723 F.2d at 1185. Based on this conclusion, the court noted that

> where the tort was previously maritime only because of situs, *the only activity being nonmaritime, Executive Jet* now requires that the tort be considered non-maritime. Thus, in the post-*Executive Jet* era we have held that *an injury to a ship construction worker on board a ship under construction and lying in navigable waters is not a maritime tort.*

Id. at 1187 (emphasis added).

While *Lowe's* general finding that admiralty jurisdiction does not inhere in claims brought by ship construc-

tion workers for injuries sustained on partially completed vessels may require us to hold that the plaintiffs' claims against Penrod lack maritime flavor, we prefer to treat *Lowe* as a backdrop to the detailed analysis *Kelly* requires us to undertake. Mindful of *Lowe* we turn to the *Kelly* factors.

1. The function and roles of the parties

Molett and Landry were land-based construction workers. Citing *Lowe,* the court in *Molett I* recognized that neither ship construction nor derrick building "has traditionally been considered a maritime business." *Molett I,* 826 F.2d at 1426. Furthermore, the fact that the plaintiffs' claims were brought against Penrod, a vessel owner, is not alone sufficient to afford maritime jurisdiction over the alleged tort. At the time of the accident, Penrod's role and function involved neither the vessel's navigation or maritime commerce. On balance, *Kelly's* first factor points strongly against finding a martitime nexus.

2. The vehicles and the instrumentalities involved

Molett I is controlling on this factor. There the court found that

> [a]lthough the vehicle upon which the accident occurred was a drilling barge, that fact is at most tangential. The barge was not complete or in navigation when the accident occurred, and the accident neither caused harm to the barge nor can be specifically attributed to the location of the derrick on the vessel. Moreover, as noted above, the chain used was of a type predominantly employed for non-maritime purposes. Neither the vehicle nor the instrumentalities involved, therefore, raise considera-

> tions creating a significant nexus to traditional maritime activities.

Id. at 1427. The vehicles and instrumentalities in the present case are the same as those in *Molett I*. Our law of the case doctrine requires that we find the maritime nexus lacking with respect to this factor. *See also Watson v. Massman Construction Co.*, 850 F.2d 219, 223 (5th Cir. 1988) (holding that, despite the presence of a barge in navigable water which contributed to the death of a construction worker, the "vehicles and instrumentalities" factor did not support a finding of maritime nexus).

3. The causation and type of injury

Molett I similarly governs the outcome of this factor. There the court noted that "[e]very factor identified as a cause of the accident might have occurred as easily on land, and the injuries the parties suffered are indistinguishable from those arising out of similar land-based mishaps." *Molett I*, 826 F.2d at 1427 (emphasis added). *Molett I* considered "every factor," not just those limited to the products liability and related indemnity claim. Notwithstanding *Molett I's* sweeping analysis, we independently find it of no overriding importance that the plaintiffs' have alleged as the cause of the accident the negligence of the vessel owner. Clearly, Molett and Landry's fall from the scaffold could have as easily occurred while in the Vicksburg shipyard.

4. Traditional concepts of the role of admiralty law

In *Molett I*, the court pronounced that "traditional concepts of the role of admiralty law do not justify treating this accident as a maritime tort." *Id.* (emphasis added).

This statement, while arguably limited to the context of the plaintiff's products liability claim and Gearench's indemnity claim, may be broad enough to dispose of the present § 905(b) claim. However, we need not rely on the scope of *Molett I's* language. Rather, even a *de novo* review of *Kelly's* fourth factor militates against a finding of maritime nexus. The matters with which admiralty jurisdiction has been traditionally concerned were articulated by the Supreme Court in *Executive Jet:*

> That law deals with navigational rules—rules that govern the manner and direction those vessels may rightly move upon the waters. When a collision occurs or a ship founders at sea, the law of admiralty looks to those rules to determine fault, liability, and all other questions that may arise from such a catastrophe. Through long experience, the law of the sea knows how to determine whether a particular ship is seaworthy, and it knows the nature of maintenance and cure. It is concerned with maritime liens, the general average, captures and prizes, limitation of liability, cargo damage, and claims for salvage.

Executive Jet, 409 U.S. at 270, 93 S. Ct. at 505. While the very heart of maritime jurisdiction is the protection of maritime commerce, the Supreme Court has recognized that this underlying purpose cannot be adequately effectuated by restricting jurisdiction to "those individuals actually *engaged* in maritime commerce." Rather, "this interest can be fully vindicated only if all operators of vessels on navigable waters are subject to uniform rules of conduct." *Foremost Insurance Co. v. Richardson,* 457 U.S. 668, 102 S. Ct. 2654, 73 L.Ed.2d 300 (1982). Thus, providing uniform navigational rules in addition to protecting maritime commerce has emerged as a central

concern underlying the exercise of maritime jurisdiction. Gearench has failed to establish that the plaintiffs' § 905 (b) claim against Penrod gives rise to an overriding concern to establish uniform rules to protect maritime commerce or navigational rules. As *Richendollar* made abundantly clear, merely cloaking claims in § 905(b) garb will no longer tote the jurisdictional baggage.

In light of the *Kelly* factors, the *Lowe* holding, and *Molett I*, we hold that the district court did not have admiralty jurisdiction over the plaintifffs' claim against Penrod and therefore could not have exercised ancillary jurisdiction over Gearench's third-party claim. The only remaining basis for jurisdiction lies in the possibility of establishing diversity.

II. DIVERSITY JURISDICTION

Diversity jurisdiction may be approached from two angles: by analyzing diversity in plaintiffs' original claims or in the claims asserted by Gearench against third-party defendants including Columbus-McKinnon. Diversity at either level will suffice to maintain federal jurisdiction. *See Illinois Cent. Gulf R. Co. v. Pargas, Inc.*, 706 F.2d 633 (5th Cir. 1983).

Like every other aspect of this case, however, the inquiry into diversity is not straightforward, in part because the party claiming federal jurisdiction has the burden of proving the existence of jurisdiction, *Pettinelli v. Danzig*, 644 F.2d 1160, 1162 (5th Cir. 1981). When jurisdiction depends on citizenship, citizenship must be "distinctly and affirmatively alleged," *McGovern v. American Airlines, Inc.*, 511 F.2d 653, 654 (5th Cir. 1975). Yet, the allegations in plaintiffs' complaints and Gear-

ench's third-party complaints are insufficient to establish diversity jurisdiction.

In their original complaint, plaintiffs alleged that they were citizens of Alabama and Louisiana and that the original defendants were corporations organized under the laws of states other than Alabama and Louisiana and with their principal places of business in states other than Alabama and Louisiana. Plaintiffs' amendments by which they later joined other defendants are similarly conclusory. These diversity allegations are defective because they do not identify the states of incorporation of the defendant corporations or their principal places of business. 28 U.S.C. § 1332(c); *see also* Fed. R. Civ. P. 84 and official Form 2(a) appended thereto. *Compare Leigh v. National Aeronautics and Space Admin.*, 860 F.2d 652 (5th Cir. 1988). The third-party complaint of Gearench against Columbus-McKinnon, later amended to add Naniwa Tekko K.K. and K-M International, does not allege any jurisdictional basis, apparently assuming the ancillary nature of Gearench's claim to plaintiffs' lawsuit.

There is a further problem. Ordinarily, the existence of diversity jurisdiction is determined at the commencement of the lawsuit, such that subsequent occurrences will not divest the court of subject-matter jurisdiction. *Carlton v. BAWW, Inc.*, 751 F.2d 781, 785 (5th Cir. 1985). An important qualification to this rule must be made if a non-diverse defendant is later added, for this destroys complete diversity and has been held to defeat jurisdiction. *Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365, 98 S. Ct. 2396, 57 L.Ed.2d 274 (1978); *Hensgens v. Deere & Co.*, 833 F.2d 1179 (5th Cir. 1987). In this case, plaintiffs added and dropped defendants sporadically throughout

the litigation prior to final judgment.[5] Gearench itself was substituted as a defendant for Armco Steel. We do not know whether one or more of these short-term defendants may have been non-diverse. Further, in the absence of briefing or any knowledge of the facts, we decline to speculate on the jurisdictional consequences of such events.

Even if plaintiffs' diversity with their multitude of defendants is not resolved in favor of jurisdiction, there remains possible complete diversity between Gearench and the parties against which it asserted claims.[6]

Despite these undeniable complexities, we need not dismiss the case, because 28 U.S.C. § 1653 provides that: "Defective allegations of jurisdiction may be amended, upon terms, in the trial or appellate courts." Our Court has repeatedly stated that § 1653 is to be construed liberally. *See, e.g., Carlton,* 751 F.2d at 789; *McGovern,* 511 F.2d at 654. Where jurisdiction is clear from the record, this Court has allowed direct amendments to the pleadings without a remand. *Carlton,* 751 F.2d at 789; *Sheehan v. Army and Air Force Exchange Serv.,* 619 F.2d 1132, 1137 n. 7 (5th Cir. 1980), *rev'd on other grounds,* 456 U.S. 728, 102 S. Ct. 2118, 72 L.Ed.2d 520

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5. The court on remand need not evaluate cross-claims or counterclaims in regard to the diversity of citizenship between such parties and the plaintiffs. *See Owen Equip., supra,* 437 U.S. at 376, 98 S. Ct. at 2403 (observing that ancillary jurisdiction exists over such claims if the principal claims in suit satisfy federal jurisdictional standards).

6. Gearench, as noted, impleaded Columbus-McKinnon, Naniwa Tekko K.K., and K-M International. Gearench also filed cross-claims against parties who had previously been joined in the suit, including Penrod. It will be incumbent on Gearench to establish complete diversity between itself and all of these parties on remand, inasmuch as we are here analyzing the Gearench claims as if filed in a separate lawsuit requiring a self-sustaining jurisdictional basis. *Cf. Owen Equip., supra,* n. 13.

(1982); *Niagara Fire Insurance Co. v. Dyess Furniture Co.*, 292 F.2d 232, 233 (5th Cir. 1961). In *Nadler v. American Motors Sales Corp.*, 764 F.2d 409, 413 (5th Cir. 1985), this Court allowed amendment on appeal based on a showing that "the record on the whole discloses a substantial likelihood that jurisdiction exists." (Citing *Carlton*, 751 F.2d at 789).

Where, as here, jurisdiction is not clear from the record, but there is some reason to believe that jurisdiction exists, the Court may remand the case to the district court for amendment of the allegations and for the record to be supplemented. *Strain v. Harrelson Rubber Co.*, 742 F.2d 888, 889-90 (5th Cir. 1984); *Freeman v. Northwest Acceptance*, 754 F.2d 553 (5th Cir. 1985); *American Motorists Insurance Co. v. American Employers' Insurance Co.*, 600 F.2d 15 (1979). *Accord Sarnoff v. American Home Products Corp.*, 798 F.2d 1075, 1079 (7th Cir. 1986) (remand to allow parties to introduce evidence and to obtain a jurisdictional finding); *Stockman v. LaCroix*, 790 F.2d 584, 587 (7th Cir. 1986) (appellate court allowed the parties to supplement the record on appeal with affidavits even though the record was devoid of jurisdictional proof).

In *Strain*, 742 F.2d at 889 n. 1, this Court carefully reviewed the record, concluding that "we find nothing in the record that establishes the existence of diverse citizenship." Yet, the Court went on to decide that dismissal of the case was not required. The Court remanded the action to the district court for a determination of whether jurisdictional grounds existed. *Id.* at 889-90. In *Freeman*, 754 F.2d at 560, a remand was also allowed since "other evidence may cast a different factual light on the citizenship of any or all of the parties."

Columbus-McKinnon distinguishes *Strain* and *Freeman* by asserting that this case is one in which jurisdiction was contested and in which the party bearing the burden of proof then failed to elicit any evidence supporting jurisdiction. We disagree. Gearench had no notice, nor should it be charged with any notice, of a defect in jurisdiction prior to this second appeal. In the original action, plaintiffs alleged not only diversity jurisdiction, but also admiralty jurisdiction based upon § 905(b) and general maritime negligence claims. The diversity of the parties was never materially at issue. Columbus-McKinnon concedes that as part of the pre-trial order "the parties stipulated that jurisdiction and venue of the case were based on: General Maritime Law, pendent state claims asserted by plaintiffs versus various defendants." Our previous discussion of the confusion in our own admiralty precedents is enough to demonstrate that it was not unreasonable for Gearench to have assumed that admiralty jurisdiction existed at least over plaintiffs' claims against Penrod.

Furthermore, Gearench was a defendant to the original action. As such, it had no burden to prove diversity between the original parties or between it and its third-party defendants assuming ancillary jurisdiction existed. Our decision in *Molett I* dealt only with the lack of admiralty jurisdiction over Gearench's cross-claim, and the issue was really what law would apply to *that* claim. As we have stated earlier, that is not dispositive of admiralty jurisdiction over plaintiffs' claims against Penrod. Our decision that focused on what law to apply to the indemnity claim should not necessarily have alerted Gearench that the jurisdiction of the court itself was at issue. Indeed, on remand, Columbus-McKinnon did not chal-

lenge the jurisdiction of the district court. Only now is there argument that admiralty jurisdiction might not exist and that the allegations of diversity are defective.

Recently, we reversed and remanded the dismissal of a claim in which the plaintiff alleged that the corporate defendant was domiciled in a diverse jurisdiction but omitted identifying its principal place of business. *Leigh, supra.* Both facts are required to establish diversity of citizenship under 28 U.S.C. § 1332(c). The defendant admitted its state of incorporation, but there was no evidence concerning the principal place of business. We held:

> [G]iven that diversity jurisdiction was not questioned by the parties and there is no suggestion in the record that it does not in fact exist, [plaintiff] should at least be given the opportunity to amend his complaint to make a more complete statement of the court's diversity jurisdiction. . . .

Leigh 860 F.2d at 653-54. We find this reasoning dispositive.

We therefore VACATE the district court's judgment and REMAND to ascertain the existence of diversity jurisdiction.

EDITH H. JONES, Circuit Judge, concurring and dissenting:

I concur in the decision to remand this case to the district court for the purpose of exploring diversity jurisdiction. With due respect to the majority, however, I cannot agree that the federal courts lacked admiralty jurisdiction over the plaintiffs' claims against Penrod.[1] An essential function of our admiralty responsibility is undercut by the majority's holding that allegations of negligence against a navigable jack-up barge lying in navigable waters lack a "maritime nexus" sufficient to invoke admiralty jurisdiction.

The majority's reasoning follows three mutually interdependent lines. First, it is asserted that our circuit's prior authorities do not permit the assertion of admiralty jurisdiction over a claim by a ship construction worker against a partially completed vessel. Second, the majority purport to disavow admiralty jurisdiction based on the *Executive Jet*[2] test as supplemented by our decision in *Kelly v. Smith*.[3] Third, the majority place significant weight upon the previous panel holding in this case, either as a matter of *stare decisis* or law of the case. I shall respond to these points in reverse order.

Despite its perhaps over-broad wording, *Molett I* does not resolve the federal courts' jurisdiction over plaintiffs'

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1. Suffice it to say that if such jurisdiction existed, I would conclude that the claim between Gearench and Columbus-McKinnon was ancillary to the plaintiffs' admiralty claim and thus within the court's jurisdiction.

2. *Executive Jet Aviation, Inc. v. City of Cleveland*, 409 U.S. 249, 93 S. Ct. 493, 34 L.Ed.2d 454 (1972).

3. *Kelly v. Smith*, 485 F.2d 520 (5th Cir. 1973), *cert. denied*, 416 U.S. 969, 94 S. Ct. 1991, 40 L.Ed.2d 558 (1974).

claims against Penrod. While that opinion refers generally to "the accident" in its analysis of the *Executive Jet* maritime nexus test, the *Molett I* panel was specifically considering Gearench's and Columbus-McKinnon's roles in the accident, and its ruling was that Gearench's third-party cross-claim against Columbus-McKinnon was not grounded in admiralty. 826 F.2d 1428. *Molett I* stated that "[t]he fatal accident had no greater impact on maritime commerce than if it had occurred while the derrick was being erected in the Mississippi ship yard." 826 F.2d at 1426. Yet, in the same paragraph, it recognized that the question was whether "the role in the accident attributed to Gearench and Columbus-McKinnon creates [a] substantial maritime nexus." The relevant portion of the opinion concluded that "Molett's and Landry's *product liability claims* and Gearench's related claim for indemnity therefore, are governed by Louisiana law." *Id.* at 1428 (emphasis added). As *Executive Jet* requires, 93 S. Ct. at 501, and *Molett I* recognizes, 826 F.2d at 1426, maritime jurisdiction applies if the *wrong* bears a significant relationship to traditional maritime activity. That the wrong asserted by plaintiffs against Gearench was a products liability claim does not *ipso facto* prevent the wrongs they asserted against Penrod from being maritime torts.[4]

Because *Molett I* is not decisive, the majority's *Executive Jet-Kelly* analysis is left largely rudderless. The majority go on, however, to make some extraordinary and, I believe, unprecedented extensions of the *Executive Jet* holding. I must agree with their observation that the

4. The plaintiffs' original complaint alleges in part that Penrod fabricated the derrick in an unsafe manner; failed to design the derrick so that it could be safely assembled; furnished improper or defective equipment; and allowed improper and negligent methods of derrick assembly.

alleged involvement of Penrod's vessel in the accident "is not alone sufficient to afford maritime jurisdiction over the alleged tort." Majority Opinion at 11-12. *Compare Foremost Insurance Co. v. Richardson,* 102 S. Ct. at 2657-59. But the majority continue: "At the time of the accident, Penrod's role and function involved neither the vessel's navigation or maritime commerce." Observing that "Molett and Landry's fall from the scaffold could have as easily occurred while in the Vicksburg shipyard," they find it "of *no* overriding importance that the plaintiffs have alleged as the cause of the accident the negligence of the vessel owner." (emphasis added) The majority characterize *Foremost* as adding to *Executive Jet's* analysis of maritime flavor only the requirement that federal courts fashion uniform navigational rules for operators of vessels. If, as the majority say, the "very heart of maritime jurisdiction" is "the protection of maritime commerce," should not admiralty be concerned with standards of care owed by a commercial, navigable, floating vessel to those who come aboard? Surely the protection of maritime commerce requires that commercial vessel owners be subject to a uniform, predictable body of law as their craft move from state to state. Uncertainty not only spawns litigation difficulties, like those retrospectively found in this case, but it also drives up insurance costs for vessel owners.

The majority's error, I believe, lies in their interpretation of *Foremost*. That Supreme Court case held admiralty jurisdiction extant over a collision between two small pleasure craft on a minor Louisiana river. The Court found a sufficient "maritime nexus" under the *Executive Jet* test because the wrong involved negligent operation of a vessel upon navigable waters. 102 S. Ct. 2658.

Foremost was a quintessentially pragmatic decision, explicitly guided by two policies: that the federal interest in promoting maritime commerce can only be fully vindicated if all vessel operators on navigable waters are subject to uniform rules of conduct; and that inconsistency and uncertainty would flow from imposing different standards of liability on vessel owners from jurisdiction to jurisdiction. 102 S. Ct. 2658-59. Those twin policies dictate even more forcefully the need to apply admiralty jurisdiction and maritime tort principles to the standard of care owed by this commercial jack-up barge, which had already been towed from Vicksburg, Mississippi to Belle Chasse, Louisiana.[5] *Compare Executive Jet,* 93 S. Ct. at 505 ("Through long experience, the law of the sea knows how to determine whether a particular ship is seaworthy . . .").

The only sensible basis for denying admiralty jurisdiction that I can see in light of *Foremost* is that this vessel was under construction and not yet in maritime commerce. Our precedents might be read to reject admiralty jurisdiction for injuries that arise on ships under construction. In *Hollister v. Luke Construction Co.,* 517 F.2d 920 (5th Cir. 1975), this court declined to apply maritime tort principles to an injury of a shipbuilder whose employer, a welding company, was allegedly negligent. The injury there occurred aboard a launched but incomplete vessel. Relying largely on *Hollister, Lowe v. Ingalls Shipbuilding, a Division of Litton,* 723 F.2d 1173 (5th Cir. 1984) rejected an indemnity claim made by a shipyard owner against manufacturers of asbestos for injuries suffered by ship construction and repair em-

5. Indeed, no party at the original trial, on appeal, or on remand ever questioned the admiralty basis for jurisdiction over this claim.

ployees. The court held that the underlying tort liability of the manufacturers for the employees' asbestos exposure claims, which could not even be definitively shown to have a maritime situs, was not based on maritime law. Neither of those cases asserted negligence directly against the vessel owner, however.[6]

Our § 905(b) cases, such as *Richendollar v. Diamond M Drilling Co.*, 819 F.2d 124, 126 (5th Cir.) (en banc), *cert. denied*, ____U.S.____, 108 S. Ct. 331, 98 L.Ed.2d 358 (1987), and *May v. Transworld Drilling Co.*, 786 F.2d 1261, 1263 (5th Cir.), *cert. denied*, 479 U.S. 854, 107 S. Ct. 190, 93 L.Ed.2d 123 (1986), hold only that such a claim must independently satisfy admiralty jurisdiction. None of those § 905(b) cases construed the maritime nexus prong of *Executive Jet* at issue here. *See* Engerrand, *Admiralty Law Survey*, 23 Tort & Ins. L.J. 251 (1988). Nor does any of those decisions contradict the principle I advocate: I see no necessary inconsistency between our previous cases rejecting admiralty jurisdiction on their particular facts, while holding it applicable to a case, like this one, in which a commercial vessel was navigational, although not yet completely built, and plaintiff has alleged vessel negligence.

The majority's holding is unfortunately not so confined. Had Molett and Landry been carpetlayers, called aboard a commercial vessel moored between voyages, the majority's decision would cast doubt on the propriety of admiralty jurisdiction. The majority's broad language

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6. A claim was made by an employee against his employer, the builder of a launched vessel undergoing sea trials, in *Williams v. Avondale Shipyards, Inc.*, 452 F.2d 955 (5th Cir. 1971). In that pre-*Executive Jet* case, Judge Brown held that maritime law governed as a matter of situs. 452 F.2d at 959.

also suggests that admiralty jurisdiction might not be present if a crewmember's personal friend, come aboard during a stop in port, slipped and fell on a ship's staircase. The accident could have as easily occurred on land; there would be no connection between it and navigation or maritime commerce. This result, however, would squarely conflict with *Kermarec v. Compagnie Generale Transatlantique,* 358 U.S. 625, 79 S. Ct. 406, 3 L.Ed.2d 550 (1959), the seminal Supreme Court decision on principles of vessel liability toward non-crewmembers.[7]

Limiting admiralty jurisdiction over a vessel's negligence to injuries that involve navigation or maritime commerce seems to me an unnecessary invitation to a chaotic round of expository litigation. There is no doubt that *Executive Jet* has left us sailing uncharted seas of admiralty jurisdiction. I cannot, however, accept the majority's suggestion that *Executive Jet's* maritime nexus requirement potentially exposes commercial vessel owners to liability under state law for injuries that occur aboard their navigationally-capable, floating vessels. I respectfully dissent.

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7. That *Kermarec* remains valid would seem uncontestable, because the Court cited it as the basis for redefining a vessel owner's liability to workers covered by the LHWCA in *Scindia Steam Nav. Co., Ltd. v. De Los Santos,* 451 U.S. 156, 101 S. Ct. 1614, 68 L.Ed.2d 1 (1981).

APPENDIX C

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAFAYETTE-OPELOUSAS DIVISION

CIVIL ACTION NO. 83-1758 "L"

JUDGE JOHN M. DUHE, JR.

BESS CAROLINE MOLETT, ET AL

vs.

PENROD DRILLING COMPANY, ET AL

J U D G M E N T

For the written reasons assigned in the Memorandum Ruling of this date:

IT IS ORDERED that the settlements made in this matter are reasonable, and the Judgment of September 4, 1986 is AFFIRMED.

Lafayette, Louisiana, February 8, 1988.

/s/ JOHN M. DUHE, JR.
Judge, U. S. District Court

APPENDIX D

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAFAYETTE-OPELOUSAS DIVISION

CIVIL ACTION NO. 83-1758 "L"

JUDGE JOHN M. DUHE, JR.

BESS CAROLINE MOLETT, ET AL

vs.

PENROD DRILLING COMPANY, ET AL

MEMORANDUM RULING

This matter comes before the Court on remand from the Fifth Circuit Court of Appeals directing this Court to make specific findings on the reasonableness of the amount of the settlement in this case. *Molett v. Penrod,* 86 F.2d 1419 (5th Cir. 1987).

John Molett, III and Harold Landry were killed in an accident when a chain manufactured under the label of Gearench, Inc. ("Gearench") broke. Their families filed this suit against Gearench and Penrod Drilling Company ("Penrod"), the owner of the barge on which the accident occurred. Gearench filed a cross-claim for contribution against Penrod and brought a third party action against Columbus McKinnon, Inc., ("Columbus McKinnon") the actual manufacturer of the chain. During jury deliberations, defendant Gearench made a settlement with plaintiff families for $1,000,000.00 each. With agreement of counsel, this Court released the jury and decided the remaining issues of contribution and indemnity, ruling

that Penrod was not liable, the chain was defective, Gearench was a non-negligent "professional vendor" who would have been liable to the plaintiffs and Gearench was entitled to full indemnity from Columbus McKinnon, the actual manufacturer. This Court made no finding as to the reasonableness of the settlement.

The parties appealed to the Fifth Circuit Court of Appeals, and that Court held there was sufficient evidence to support the judge's findings of fact, but it determined that Gearench was entitled to indemnity only for such amount of the settlement that was reasonable. The Court then remanded and directed the trial court to make findings on the reasonableness of the settlement. The Fifth Circuit stated:

> The question involves not only the proof of liability and the amount of damages sustained but also the extent to which the failure of Molett and Landry to wear safety belts, and of McBroom to insure that belts were worn, contributed to the mens' deaths. 86 F.2d at 1432.

After reviewing my trial notes and briefs of both parties, I find the settlement was reasonable.

Counsel for Columbus McKinnon misstates the issue. This Court is not to determine as a matter of fact or of law who would be liable to the plaintiff, nor the amount of any award. Rather, the district court's role at this point is to determine whether, considering the possible risk of judgment, the settlement was reasonable. Since settlement came after the full case had been presented to the jury, evidence as to liability of all parties does bear on the decision of reasonableness, but determinations of

fact by the trial judge are dispositive since the jury would have been free to decide differently.

In deciding to compromise a case, defendants and their counsel must weigh many factors. The effectiveness of the presentations of both sides, the effect of evidence on the jury, particularly evidence contrary to their position, and perceived sympathies of the jury are all factors that must be considered. As Columbus McKinnon points out in its brief, the jury had figures before it showing lost wages alone as high as $1.25 million per family. Arguments of counsel that this figure was too high may or may not have persuaded the jury. Loss of consortium awards to the families might also have been very high. A settling party must realize that courts are reluctant to reduce the amounts of jury awards and do so only when they are so high as to "shock the judicial conscience". *See Caldarera v. Eastern Airlines,* 705 F.2d 778 (5th Cir. 1983). Thus, even with a likely reduction for contributory negligence or negligence of the employer, the risk to Gearench was substantial.

Columbus McKinnon maintains no settlement was reasonable because Gearench would have had a defense of prescription and would not have been liable for any judgment. Again, this was a matter that Gearench and its counsel must have considered in making the settlement offer. It is by no means certain that a jury would have found Penrod not solidarily liable, and the question of whether maritime law or Louisiana law applied was also uncertain at the time the settlement was confected.

Accordingly, considering all of the above, I find that the settlements entered into by Gearench and plaintiff families were reasonable.

Lafayette, Louisiana, February 8, 1988.

/s/ JOHN M. DUHE, JR.
Judge, U.S. District Court

APPENDIX E

Bess Caroline MOLETT, Individually and on Behalf of her son, John Dreisch, Plaintiffs,

v.

PENROD DRILLING CO., Defendant-Appellee.

GEARENCH, INC., Defendant-Third Party Plaintiff-Appellee-Appellant,

v.

COLUMBUS-McKINNON, Inc., Third Party Defendant-Appellant.

No. 86-4665.

United States Court of Appeals, Fifth Circuit.

Sept. 15, 1987.

Rehearing Denied Oct. 13, 1987.

David R. Frohn, Camp, Carmouche, Barah, Gray, Hoffman & Gill, Lake Charles, La. for Columbus-McKinnon, Inc.

Jeffrey A. Rhoades, Davidson, Meaux, Sonnier & McElligott, V. Farley Sonnier, Lafayette, La., for Gearench, Inc.

Daniel Meeks, Abbott, Webb, Best & Meeks, Michael J. Kincade, New Orleans, La., for Penrod Drilling.

Appeals from the United States District Court for the Western District of Louisiana.

Before RUBIN, GARZA, and JONES, Circuit Judges.

ALVIN B. RUBIN, Circuit Judge:

The seller of a chain compromised a liability suit against it and seeks indemnity from the manufacturer of the chain pursuant to its third party demand in that suit. The district court held that the chain was defective, and the seller who marketed the chain under its own name was entitled to indemnification from the manufacturer of the chain but not to contribution from the owner of the barge on which the accident occurred. Both the manufacturer and the seller appealed. We hold that the manufacturer must fully indemnify the seller for the amount reasonably paid in settlement, remand for determination of reasonableness of the amount paid, and pretermit decision on the seller's conditional appeal against the ship owner.

I.

On January 27, 1983, John Molett, III, and Harold E. Landry were killed in an accidental fall while constructing the derrick on a jack-up barge owned by Penrod Drilling Company. Penrod had contracted with Marathon LaFourneau Company to construct the rig at Marathon's shipyard near Vicksburg, Mississippi. After Marathon had virtually completed the rig, Marathon had it towed to Belle Chasse, Louisiana, for final outfitting, including erection of leg sections and a derrick that would have been too tall to pass under bridges between Vicksburg and the Gulf of Mexico. Marathon subcontracted with McBroom Rig Builders, Inc., Molett and Landry's employer, to erect the derrick.

On the day of the accident, Molett and Landry were completing construction of the top sections of the derrick. To lift materials to the top of the derrick, McBroom used an apparatus known as a "gin pole" which had been fabricated by Penrod. The forty-foot pole was equipped with pulleys and other tackle with one end anchored to the derrick so that the upper end of the pole could be suspended leaning away from the derrick structure and used as a portable stiff-leg crane. As construction of the derrick progressed it was necessary from time to time to "jump" the gin pole farther up the derrick so that materials could be lifted higher. "Jumping the gin pole" was accomplished by securing a chain around the uppermost derrick beams and suspending from the chain a pulley system designed to draw up the pole. The base of the gin pole would then be detached from the derrick, the lift executed and the gin pole resecured.

The "jump" during which the accident occurred was the first one attempted that day. Molett and Landry were standing on a scaffold 147 feet above the rig floor waiting for the gin pole to be raised. To lift the gin pole, McBroom employees wrapped a new spinning chain around the top derrick beams and attached to it a snatch block and related tackle. Two hooks had been attached to the chain, and one was inserted into the chain to secure it to the beam. The second hook was left dangling, unused, over the side of the beam. As the lift was attempted, the gin pole suddenly broke loose and fell, hitting the scaffold on which Molett and Landry were standing and sending them and most of their equipment tumbling to the rig floor. In violation of state, federal, and company safety regulations,

neither man was wearing a safety line when the accident occurred.

After the accident, McBroom employees searched for evidence of its cause. They discovered a chain still hanging from the top derrick beam, almost entirely unwound and missing one hook, and the snatch block intact on the rig floor. The missing hook and any remnant of chain that may have been attached to it were never recovered, evidently having fallen into the river.

The survivors of Molett and Landry brought wrongful death actions against Penrod, Marathon, and other companies believed to be the manufacturers of the chain and hook used to lift the gin pole when the accident occurred. Ultimately, it was discovered that the chain bore the trademark of Gearench, Inc., and that the hook was manufactured by Kulkoni, Inc. The complaint was therefore amended to name those companies as defendants guilty of manufacturing defective products. Thereafter, Gearench filed a third-party demand against Columbus McKinnon, Inc., contending that Columbus McKinnon had actually manufactured the allegedly defective chain and that Gearench had not contributed in any way to any defect that might have existed. Gearench also sought contribution from Penrod for any liability imposed against it, contending that Penrod was at fault for failing to ensure that McBroom employees used safety lines.

The case was tried before a jury with attorneys representing all named parties present. On the fourth day of trial, during jury deliberations, Gearench settled with the plaintiff families, paying $1 million to each. While

counsel were informing the court of the settlement agreement, the jury sent notice that it had reached a verdict. The trial judge announced that, because a settlement had been reached, he would decide Gearench's third-party claim for indemnity and contribution against Columbus McKinnon and Penrod. None of the parties objected, and, in the presence of counsel, the judge discharged the jury without obtaining their verdict. The trial judge then proceeded—after argument and briefing—to decide the remaining issues.

The district court held that the gin pole fell because the chain by which it had been suspended broke. Although Gearench had sold the chain under its trademark as its own product, the court found that the chain had actually been manufactured by Columbus McKinnon, that it was unreasonably dangerous in normal use (hence defective), and that the defect caused the accident. The court concluded further that Gearench was unaware of the defect and in no way caused or contributed to the problem. Similarly, Penrod was found blameless for the fact that McBroom employees were working on its vessel without safety lines.

In its conclusions of law the district court held that Gearench's third-party demand against Penrod for indemnity or contribution is governed by § 905(b) of the Longshore and Harbor Workers' Compensation Act[1] and that Gearench failed to establish that Penrod had actual knowledge of a dangerous condition leading to the decedents' deaths or was aware that McBroom was unreasonably failing to protect its employees from such

1. 33 U.S.C. § 901 *et seq.* (1982).

a condition.[2] It therefore concluded that Gearench's claim against Penrod must fail.

The court next concluded that Columbus McKinnon, as the actual manufacturer of a defective product that caused the deaths, is strictly liable in tort for the damages under either Louisiana or maritime law. The court concluded that, because Gearench had held the product out as its own, Gearench's liability to members of the public injured by the product mirrors that of the manufacturer. After reviewing related law, however, the court determined that under both Louisiana and maritime law a non-negligent "professional vendor" is entitled to indemnity from the negligent manufacturer and therefore that Gearench was entitled to indemnity from Columbus McKinnon. It made no finding concerning the reasonableness of the amount paid in settlement.

Columbus McKinnon now appeals from the judgment against it contending: (1) the district court denied Columbus McKinnon its right to a jury trial by adopting the role of fact-finder in deciding the third-party claims; (2) the recond is inadequate to support a finding that a manufacturing defect in the chain caused the accident; (3) Louisiana law should be applied to the indemnity claim against Columbus McKinnon, and under Louisiana law a professional vendor such as Gearench is considered a joint tortfeasor ineligible to recover full indemnification; and (4) if maritime law applies, Gearench is not entitled to indemnity on a mere showing of potential liability to the plaintiffs because it failed to provide Columbus

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2. *See Scindia Steam Navigation Co., Ltd. v. De Los Santos,* 451 U.S. 156, 101 S. Ct. 1614, 68 L.Ed.2d 1 (1981); *Helaire v. Mobil Oil Co.,* 709 F.2d 1031, 1035-40 (5th Cir. 1983).

McKinnon a meaningful opportunity to approve the settlement or assume defense of the suit before entering a settlement agreement. As a protective measure only, Gearench contends that, if it is not entitled to be indemnified fully by Columbus McKinnon, it is entitled to indemnity or contribution from Penrod.

II.

Columbus McKinnon's contention that it was entitled to have factual issues relevent to its potential liability decided by a jury comes too late. The case has already been fully presented to a jury at a trial in which all interested parties were represented and afforded the opportunity to question witnesses and present evidence. Interrogatories relevant to each of Gearench's third-party claims had been drafted and submitted to the jury, and, by the time the settlement agreement was announced, the jury was prepared to deliver its verdict. At that time, any party had the right to demand that the verdict be read. Columbus McKinnon, however, remained silent as the trial judge announced his intention to decide the third-party claims himself and to discharge the jury. Even when it filed its post trial memorandum three weeks later, Columbus McKinnon gave the court no indication that it objected to the court's proposed plan.

On appeal, Columbus McKinnon argues for the first time that it never intended to waive its right to a jury trial when it silently acquiesced in the court's announced intention to decide the third-party claims. It contends that it believed the trial court intended to decide only issues of law, including whether maritime or Louisi-

ana law governed the indemnity claim against it and whether—if maritime law applied—Gearench had offered it sufficient opportunity to participate in the settlement agreement or alternatively to choose to assume defense of the case.[3]

This justification does not explain Columbus McKinnon's failure to object to the discharging of the jury. Resolution of the legal issues Columbus McKinnon contends it recognized at that time would not necessarily have rendered the jury's findings moot, and Columbus McKinnon was not entitled to require that the entire case be again tried in the event that applicable law required Gearench to prove itself actually liable to the plaintiffs. The explanation offered by Columbus McKinnon also fails to excuse its continued silence on the jury issue in view of assertions made by Gearench in its post trial memorandum that the evidence supported a determination that it was actually liable to the plaintiffs and entitled to indemnity from Columbus McKinnon even if the court determined that proof of potential liability was not enough. Nor has Columbus McKinnon excused its failure to raise the issue before the district court in a Rule 60(b) motion for post-judgment relief once the court's opinion made its intention unmistakably clear.

Whether or not Columbus McKinnon's silence is construed as a waiver, properly speaking, of its right to jury trial, the questions it now presents raise issues not raised before the trial court, and such issues will not ordinarily

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3. *See Parfait v. Jahncke, Inc.*, 484 F.2d 296 (5th Cir. 1973).

be considered on appeal.[4] Columbus McKinnon's silence on the matter at trial and until now certainly suggested to the trial court and opposing parties that it acquiesced in the court's proposed plan. Columbus McKinnon may not now deny that it waived its right to a jury trial and demand a new trial only after it has lost on the merits and failed to make a timely objection before the district court. Therefore, all of the evidence having been heard, the findings of the trial court must be accepted unless clearly erroneous.[5]

III.

To recover in a products liability suit brought under either Louisiana[6] or maritime law,[7] a plaintiff must prove by a preponderance of the evidence that: the product was defective, that is, unreasonably dangerous in normal use; the product was in normal use at the time the injury occurred; the defect caused the injury; and the defect existed when the product left the control of the manufacturer.[8] These facts, like all others, may be

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4. *See, e.g., Singleton v. Wulff*, 428 U.S. 106, 120-21, 96 S. Ct. 2868, 2877, 49 L.Ed.2d 826 (1976); *United States v. Allegheny-Ludlum Indus., Inc.*, 517 F.2d 826, 840 n. 13 (5th Cir. 1975), *cert. denied*, 425 U.S. 944, 96 S. Ct. 1684, 48 L.Ed.2d 187 (1976); *Zimmer v. McKeithen*, 485 F.2d 1297, 1307 (5th Cir. 1973), *aff'd sub nom. East Carroll Parish School Bd. v. Marshall*, 424 U.S. 636, 96 S. Ct. 1083, 47 L.Ed.2d 296 (1976). *Compare Lirette v. N.L. Sperry Sun, Inc.*, 820 F.2d 116 (5th Cir. 1987) (en banc).

5. Fed. R. Civ. P. 52(a).

6. *Joseph v. Bohn Ford, Inc.*, 483 So.2d 934, 940 (La. 1986).

7. *See East River Steamship Corp. v. Trans-america Delaval, Inc.*, 476 U.S. 858, 106 S. Ct. 2295, 2299, 90 L.Ed.2d 865 (1986); *Watz v. Zapata Off-Shore Co.*, 431 F.2d 100, 120 (5th Cir. 1970).

8. *Joseph*, 483 So.2d 934, 940 (La. 1986); Restatement of Torts 2d, § 402A.

established by either direct or circumstantial evidence,[9] and the circumstantial evidence need not negate all other possible causes.[10] Identification of a specific defect is often impossible, and the plaintiff need create only a reasonable inference that the defective condition of the product was present at the time of manufacture.[11] If the product is proved defective by reason of its hazard in normal use, the plaintiff need not prove any particular negligence by the maker in its manufacturing processing.[12]

The trial court held that circumstantial evidence proved that the chain was unreasonably dangerous in normal use, hence defective, and that the defect in the chain caused it to break in normal use, causing the accident. Gearench was found neither to have abused the chain nor to have contributed in any way to the existence of the defect. Although the court made no specific finding that the defect existed at the time the chain was released by the manufacturer, that finding is implicit in its subsidiary findings and its conclusions that Gearench was liable to the plaintiffs and that Columbus McKinnon was bound to pay reasonable indemnification.

The evidence is sufficient to support each of these findings. Uncontroverted testimony established that the chain was in normal use at the time of the accident. The gin pole weighed approximately 1,200 pounds and was

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9. *Joseph,* 483 So.2d at 940; *Jordan v. Travelers Insurance Co.,* 257 La. 995, 245 So.2d 151 (1971).

10. *DeBattista v. Argonaut-Southwest Insurance Company,* 403 So.2d 26 (La. 1981), *cert. denied,* 459 U.S. 836, 103 S. Ct. 82, 74 L.Ed.2d 78 (1982).

11. *Joseph,* 483 So.2d at 940.

12. *Id.*

suspended from a block assembly linked into one or two loops of the chain. Thus, under any version of the facts, each link of the chain was supporting far less than its minimum rated lifting capacity of 12,500 pounds. The breaking of the chain when supporting these relatively light weights establishes per se that it was defective.

Expert testimony established that the most likely causes of the accident were failure either of the chain or the hook, as shown by the fact that only one hook remained on the chain after the accident. Testing revealed that remnants of the hook would have remained attached to the chain had the accident been caused by hook failure. Moreover, one expert testified that the description of how the chain was rigged and how the remnant was found suggested that it was the free hook that was lost. The conclusion that the chain failed is also supported by the fact that the chain measured slightly more than 18½ feet after the accident whereas such chains were usually sold in standard lengths of 18 and 20 feet. Although employees of Gearench and Columbus McKinnon stated that chains were routinely cut two or three links longer than standard to insure that customers were given full value, it was also established that the chain was most likely sold to Gearench precut by Columbus McKinnon and that the additional links would normally add no more than two or three inches to the chain.

Expert testimony was introduced establishing that the chemistry of the chain varied beyond tolerances for the type of steel used and that such variation was the suspected cause of the failure. The chain remnant found after the accident also contained a misshaped link that experts said should have been rejected by factory inspec-

tors, casting doubt on the quality of Columbus McKinnon's quality control. Although Columbus McKinnon witnesses testified that every chain was tested at levels far exceeding the weight of the gin pole, one expert testified that Columbus McKinnon's practice of simply replacing defective chain segments with new material created a likelihood that some material left the factory untested.

Columbus McKinnon contends that the evidence does not reasonably exclude the possibility that the chain had been abused before the accident. Columbus McKinnon notes, in particular, testimony that Penrod employees had borrowed and used the chain before the accident. That fact, however, does not establish a reasonable basis to conclude that the chain was abused. No one noted having noticed anything wrong with the chain before the accident, and testimony was offered that significant structural damage to the chain so close to its end would almost certainly have been discovered by employees rigging the chain to jump the gin pole. Similarly, the record contains no evidence of prior abuse of the chain by McBroom employees or Gearench.

The findings of the district court are, therefore, amply supported by the record.

IV.

Because it concluded that Gearench is entitled to be indemnified by Columbus McKinnon under either Louisiana or maritime law, the district court declined to decide which body of law governs this product liability action. Columbus McKinnon argues, however, that the accident in this case lacked sufficient nexus with traditional mari-

time activities to satisfy the test of maritime jurisdiction set forth by the Supreme Court in *Executive Jet Aviation, Inc. v. City of Cleveland.*[13] Consequently, it contends both that Louisiana law governs and that under Louisiana law a professional vendor holding products out to the public as its own is not entitled to full indemnification from the manufacturer.

A.

In *Executive Jet,* the Supreme Court rejected the notion that maritime tort jurisdiction can be determined on the basis of the location of the injury alone. In the absence of legislation to the contrary, the Court held, maritime jurisdiction of a tort claim exists only when the injury occurs on or over navigable waters and the wrong bears a significant relationship to traditional maritime activity,[14] thus significantly restricting the scope of that jurisdiction as it had previously been exercised by lower federal courts. Because Molett and Landry were injured while working aboard a nearly completed vessel on navigable waters, the locality portion of the test is satisfied. The issue is whether the injury on which suit is based had the requisite significant relationship to traditional maritime activities, a quality also called "maritime flavor" or "nexus to maritime activities."[15]

The use of such terms as "significant relationship," "maritime flavor," and "nexus" to describe the kind of claim that satisfies the second part of the *Executive Jet* test indicates that the criteria are so imprecise as to defy

13. 409 U.S. 249, 93 S. Ct. 493, 34 L.Ed.2d 454 (1972).

14. *Id.* at 268, 93 S. Ct. at 504.

15. *Smith v. Pan Air Corp.,* 684 F.2d 1102 (5th Cir. 1982).

description by either a formula or an objective standard. In *Foremost Insurance Company v. Richardson*[16] the Supreme Court held that direct involvement in maritime commercial activity is not essential, finding maritime jurisdiction to extend to a collision between two pleasure vessels, but this decision tells us only that such involvement is not necessary without elucidating what does suffice.

The Court's decisions in *Executive Jet* and *Foremost* suggest that indicia of maritime flavor can be found in (1) the impact of the event on maritime shipping and commerce (2) the desirability of a uniform national rule to apply to such matters and (3) the need for admiralty "expertise" in the trial and decision of the case. Before these decisions had been rendered, this court, in *Kelly v. Smith,*[17] had outlined four factors to be considered in determining the existence of a substantial maritime relationship: the functions and roles of the parties; the types of vehicles and instrumentalities involved; the causation and the type of injury; and traditional concepts of the role of admiralty law.[18] Without abandoning *Kelly v. Smith,* we apply both its analysis and the indicia divined from *Executive Jet* and *Foremost.*

The fatal accident had no greater impact on maritime commerce than if it had occurred while the derrick was being erected in the Mississippi shipyard. Molett and Landry were land-based rig builders engaged in building an oil derrick on an incomplete jack-up barge. Neither

16. 457 U.S. 668, 102 S. Ct. 2654, 73 L.Ed.2d 300 (1982).

17. 485 F.2d 520 (5th Cir. 1973), *cert. denied,* 416 U.S. 969, 94 S. Ct. 1991, 40 L.Ed.2d 558 (1974).

18. 485 F.2d at 525.

derrick building nor ship construction had traditionally been considered a maritime business,[19] and the record contains no suggestion that the men were performing any other tasks customarily done by seamen. Similarly, the role in the accident attributed to Gearench and Columbus McKinnon creates no substantial maritime nexus. Columbus McKinnon manufactured chains, in this case a spinning chain typically used in oil production. Although it may have been foreseeable that the chain eventually might be used on a drilling barge for maritime purposes, such uses certainly were not the expected norm. Gearench's role in selling this particular chain to a rigging company such as McBroom similarly evokes no flavor of admiralty.

It might be desirable to have nationally uniform products liability rules, but the nature and scope of products liability has been left to the states, and no more disruption arises from applying the state-law rules to this accident than if it had occurred in the shipyard. The application of products liability rules to such an accident requires no expertise in maritime law. Although the vehicle upon which the accident occurred was a drilling barge, that fact is at most tangential. The barge was not complete or in navigation when the accident occurred, and the accident neither caused harm to the barge nor can be specifically attributed to the location of the derrick on a vessel. These facts distinguish this case from those cited to us by Gearench in support of application of maritime law.[20] More-

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19. *See, e.g., Lowe v. Ingalls Shipbuilding, A Division of Litton,* 723 F.2d 1173, 1185, 1187 (5th Cir. 1984).

20. *See, e.g., Lewis v. Timco, Inc.,* 716 F.2d 1425, 1427 (5th Cir. 1983) (en banc); *Sperry Rand Corp. v. Radio Corp. of America,* 618 F.2d 319 (5th Cir. 1980); *Jig the Third Corp. v. Puritan Mar, Inc. Under. Corp.,* 519 F.2d 171 (5th Cir. 1975).

over, as noted above, the chain used was of a type predominantly employed for nonmaritime purposes. Neither the vehicle nor the instrumentalities involved, therefore, raise considerations creating a significant nexus to traditional maritime activities.

In *Woessner v. Johns-Manville Sales Corp.*,[21] we considered whether a worker's exposure to asbestos dust while working aboard vessels in navigable waters was a sufficient basis for maritime tort jurisdiction. Even though the plaintiff had been doing work traditionally done by members of the ship's crew, we held that "where neither the defendant, the injury, nor the instrumentality of the injury has any particular connection to maritime navigation or commerce, other concerns such as the demands of federalism may override."[22] Turning to the *Kelly* factors, we found it significant that the workers, like Molett and Landry, were land based, pointed to the state interest in providing uniform treatment to similarly situated workers, and declined admiralty jurisdiction. Thus this court has expressly applied the narrow view of admiralty jurisdiction articulated in *Executive Jet*.

The causation and type of injury involved in this case also appear to be unrelated to its occurrence on navigable waters. Every factor identified as a cause of the accident might have occurred as easily on land, and the injuries the parties suffered are indistinguishable from those arising out of similar land-based mishaps.[23]

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21. 757 F.2d 634, 646 (5th Cir. 1985).

22. *Id.* at 643.

23. *See Id.*, at 647; *Sohyde Drilling & Marine Co. v. Coastal States Gas Producing Co.*, 644 F.2d 1132, 1137-38 (5th Cir.), *cert. denied*, 454 U.S. 1081, 102 S. Ct. 635, 70 L.Ed.2d 615 (1981).

Finally, we note that traditional concepts of the role of admiralty law do not justify treating this accident as a maritime tort. In *Executive Jet* the Supreme Court summarized the matters with which admiralty law traditionally has been concerned:

> That law deals with navigational rules—rules that govern the manner and direction those vessels may rightly move upon the waters. When a collision occurs or a ship founders at sea, the law of admiralty looks to those rules to determine fault, liability, and all other questions that may arise from such a catastrophe. Through long experience, the law of the sea knows how to determine whether a particular ship is seaworthy, and it knows the nature of maintenance and cure. It is concerned with maritime liens, the general average, captures and prizes, limitation of liability, cargo damage, and claims for salvage.[24]

Gearench has not established that this tort raises any such concerns or that it evidences an overriding need to establish a uniform development of law governing maritime industries.[25]

We conclude, therefore, that the accident in this case is insufficiently connected to traditional maritime activity to invoke admiralty jurisdiction. Molett's and Landry's product liability claims and Gearench's related claim for indemnity, therefore, are governed by Louisiana law.

B.

In Louisiana, a non-manufacturer seller of a de-

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24. 409 U.S. at 270, 93 S. Ct. at 505.

25. *See Foremost Ins. Co.*, 457 U.S. at 677, 102 S. Ct. at 2660, 73 L.Ed.2d 300 (1982); *Owens-Illinois, Inc. v. United States District Court*, 698 F.2d 967, 971 (9th Cir. 1983).

fective product is not liable for damages in a products liability action unless he knew or should have known that the products sold were defective.[26] But knowledge of a product's defects is imputed to "professional vendors" who market products as their own and whose relationship with manufacturers make the sellers capable of controlling the quality of their merchandise.[27] Such sellers are liable to the public in the same manner as the manufacturer.[28] The district court therefore concluded properly that Gearench, having sold the chain to McBroom under its own trademark and having had such a sustained relationship with Columbus McKinnon as to make it capable of exercising quality control, was liable to the plaintiffs for injuries caused by the defect in the chain.

The imputing of knowledge to non-negligent retailers so as to make them liable is meant to protect the public, not the manufacturer or party actually at fault. Louisiana has, therefore, adopted the general rule that a party, like Gearench, whose fault is merely constructive or vicarious is entitled to full indemnity from the party whose actual fault caused injury.[29] This right has been extended to a non-negligent retailer held liable to its customer for dam-

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26. *Jones v. Employer's Mutual Liability Ins. Co.*, 430 So.2d 357, 359 (La. App. 1983); *Harris v. Atlantis Stove Works, Inc.*, 428 So.2d 1040, 1043 (La. App.), *writ denied*, 434 So.2d 1196 (La. 1983); *Hudgens v. Interstate Battery Systems of America, Inc.*, 370 So.2d 202, 209 (La. App.), *writ denied*, 371 So.2d 835 (La. 1979).

27. *Chappius v. Sears, Roebuck & Co.*, 358 So.2d 926, 930 (La. 1978).

28. *Id.*

29. *See Dusenbery v. McMoRan Exploration Co.*, 458 So.2d 102, 105 (La. 1984); *Appalachian Corp. v. Brooklyn Cooperage Co.*, 151 La. 41, 91 So. 539 (1922).

ages by an appliance it installed in the customer's home.[30] Under this rule, Gearench would be entitled to indemnification from Columbus McKinnon.

Citing *Penn v. Inferno Manufacturing Corp.*,[31] however, Columbus McKinnon argues that a different rule applies in Louisiana to professional vendors who hold out products as their own because such sellers are deemed per se negligent for failing to detect the defect and for mislabeling the product as their own. In *Penn*, the Louisiana court denied the retailer's indemnity claim against the manufacturer not because a professional seller is per se liable jointly with the manufacturer under strict liability but because the court found that the seller was directly involved in the manufacturing process. The pressure gauge sight glasses that failed in that case were poured and cast in molds provided by the seller, and the court noted that faulty or defective molds might have created the bubbles in the glass that caused the failure.[32] The court also noted that, because of its involvement in the manufacturing process, the retailer was negligent for failing to inspect the finished product and for failing to warn customers of potential hazards. Given these facts, we do not believe that Louisiana courts would interpret *Penn* as establishing a rule that professional vendors are guilty of actual fault simply for failing to detect hidden defects and labeling products as their own. In all other respects relevant to the present case, Louisiana products liability law is in accord with the law of the majority of

30. *Fairburn v. Montgomery Ward & Co., Inc.*, 349 So.2d 1280, 1282 (La. App. 1977).

31. 199 So.2d 210 (La. App.), *writ denied*, 202 So.2d 649 (La. 1967).

32. *Id.* at 218.

other states. We therefore conclude that the district court acted properly by referring to the law of other states to determine Gearench's indemnity claim. A non-negligent professional seller is entitled to indemnity from the actual manufacturer of a defective product.[33]

Columbus McKinnon argues alternatively that Gearench exercised sufficient control over production of the chain to make *Penn* applicable. This contention simply is not supported by the record. However much Gearench *might* have monitored manufacturing, it *actually* participated in design and manufacture only by requesting that the chain be embossed with its mark and capable of lifting a specified weight with a specified amount of elongation. The materials employed and the method of manufacture were left completely in the discretion of Columbus McKinnon, and the evidence established that Columbus McKinnon altered its production techniques at will. Because the evidence adequately supports the trial court's finding that Gearench in no way contributed to the defect in the chain and is not guilty of actual fault for the injury that resulted, it is entitled to recover from Columbus McKinnon the full amount it reasonably paid the plaintiffs in settlement.

Our determination that Gearench is entitled to indemnification does not, however, end our inquiry. We have held that an indemnitee who settles a claim against it without first tendering the settlement for approval or offering the defense in exchange for a hold-harmless agreement must, to recover from its indemnitor,

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33. *See Burch v. Sears, Roebuck & Co.*, 320 Pa. Super. 444, 467 A.2d 615, 622-23 (1983); L. Frumer & M. Friedman, 3A *Products Liability* § 44.02[3][b] & n. 9 (1986).

prove that it was actually liable for the amount paid,[34] the settlement was reasonable, and the indemnitor was not prejudiced by the indemnitee's failure either to inform the indemnitor of settlement negotiations or to tender it the defense of the suit. Otherwise, the indemnitee might spend the indemnitor's money without either a judgment of the court or the indemnitee's agreement. Such proof is not, of course, required if the indemnitee's claim is founded on judgment or on a written contract establishing some other basis for indemnification, and actual liability need not be shown if the indemnitor was tendered the defense and refused it.[35] Even if the indemnitee tenders the defense and is not required to show actual liability, it must demonstrate both its potential liability to the original plaintiff[36] and the reasonableness of the settlement.

While the decisions on which we rely were not based on Louisiana law, their logic is unassailable, and counsel have cited no Louisiana decisions to the contrary. We therefore apply their principles. Gearench offered no real opportunity to Columbus McKinnon either to negotiate the settlement or to take over defense of the suit. Its third party demand against Columbus McKinnon came before the trial. It negotiated the settlement without, so far as the record shows, even informing Columbus McKinnon of the negotiations. It reached its agreement with

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34. *Whisenant v. Brewster-Bartle Offshore Company*, 446 F.2d 394 (5th Cir. 1971) (relying on *Tankerederiet Gorion A/S v. Hyman-Michaels Company*, 406 F.2d 1039 (6th Cir. 1969)).

35. *Whisenant*, 446 F.2d at 401-02; *Parfait v. Jahncke Service, Inc.*, 484 F.2d 296 (5th Cir. 1973).

36. *Parfait*, 484 F.2d at 304; *Smith v. Brown & Root Marine Operators, Inc.*, 243 F.Supp. 130 (W.D. La. 1965), *aff'd per curiam sub nom. Underwater Services, Inc. v. Brown & Root Marine Operators, Inc.*, 376 F.2d 852 (5th Cir. 1967).

the plaintiffs after the case had been fully tried. Columbus McKinnon at that time had no real opportunity either to defend or to participate in negotiations. It was not obliged, and it refused, to stipulate to the reasonableness of the settlement. While its liability may have been certain, it was presented with a *fait accompli* as to consent. Even if actually liable, it should not be cast absent proof that the amount paid was reasonable.

The district court's fact findings are sufficient to establish actual liability, but they do not even intimate a determination that it was reasonable to pay each group of survivors $1 million.

Unlike the district court's implied finding that the defect that caused the accident existed when the chain left the factory, the question whether the reasonableness of the amount of settlement was considered and decided is not answered by the court's subsidiary findings. The question involves not only the proof of liability and the amount of damages sustained but also the extent to which the failure of Molett and Landry to wear safety belts, and of McBroom to ensure that belts were worn, contributed to the men's deaths. We must therefore remand the case for the district court to decide the reasonableness of the amount paid on each claim.

V.

Because we have determined that Louisiana law governs the products liability claim and that the record supports the trial court's finding that Gearench was actually liable to the plaintiffs under Louisiana law, we do not address Columbus McKinnon's alternative position that—had maritime law applied—Gearench's request that Columbus

McKinnon either approve the settlement or assume defense of the action was insufficient to entitle it to indemnity on a mere showing of potential liability. Similarily, we need not decide Gearench's conditional claim for contribution or indemnity from Penrod. Gearench is entitled to recover from Columbus McKinnon all monies it reasonably agreed to pay the plaintiffs, and Columbus McKinnon has not sought contribution from Penrod. Moreover, should the district court determine that any portion of Gearench's settlement was unreasonable, Gearench would not be entitled to recover the excess from either Columbus McKinnon or Penrod.[37]

For the reasons stated above, the judgment of the district court is AFFIRMED except that the matter is REMANDED for specific findings on the reasonableness of the amount of the settlement.

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37. *See, e.g., Neville Chemical Co. v. Union Carbide Corp.*, 294 F.Supp. 649 (D.C. 1968), *aff'd in part, vacated in part*, 422 F.2d 1205 (3d Cir.), *cert. denied*, 400 U.S. 826, 91 S. Ct. 51, 27 L.Ed.2d 55 (1970); *Martinique Shoes, Inc. v. New York Progressive Wood Heel Co.*, 207 Pa. Super. 404, 217 A.2d 781 (1966).

APPENDIX F

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAFAYETTE-OPELOUSAS DIVISION

CIVIL ACTION NO. 83-1758 "L"

BESS CAROLINE MOLETT, ET AL

vs.

PENROD DRILLING CO., ET AL

JUDGMENT

This matter having been presented to the Court for decision after trial on the merits on the third party demand of Gearench, Inc. against Penrod Drilling Company and Columbus-McKinnon, Inc. and the Court for written reasons assigned July 30, 1986:

IT IS ORDERED, ADJUDGED AND DECREED that there be judgment in favor of Penrod Drilling Company against Gearench, Inc. dismissing the third party demand with prejudice at the cost of Gearench, Inc.

IT IS ORDERED, ADJUDGED AND DECREED that there be judgment in favor of Gearench, Inc. against Columbus-McKinnon, Inc. in the full sum of TWO MILLION AND 00/100 ($2,000,000.00) DOLLARS plus legal interest from date of judgment until paid plus all cost of this action.

Done and Signed at Lafayette, Louisiana on this 3rd day of Sept., 1986.

/s/ JOHN M. DUHE, JR.
United States District Judge

APPENDIX G

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAFAYETTE-OPELOUSAS DIVISION

CIVIL ACTION NO. 83-1758 "L"

BESS CAROLINE MOLETT, ET AL

vs.

PENROD DRILLING COMPANY, ET AL

To the extent that the following findings of fact contain conclusions of law, and the conclusions of law contain findings of fact, they are adopted as such.

FINDINGS OF FACT

1. This matter arises out of a wrongful death action brought by the survivors of John Molett and Harold Landry. The decedents were employees of McBroom Rig Building Services, Inc. ("McBroom"), who was hired by Penrod Drilling Company ("Penrod") to erect a derrick on Penrod's vessel. While the decedents were engaged in the construction of the derrick on Penrod's vessel, a gin pole that was being hoisted fell onto a scaffold on which they were standing sending them to their deaths. The gin pole fell because the chain by which it had been suspended broke.

2. The survivors brought action against numerous defendants, including Gearench, Inc. ("Gearench"), the alleged manufacturer of the chain. Gearench, in turn,

filed third-party demands against, among others, Columbus-McKinnon Corporation ("Columbus-McKinnon"), who it alleged was the actual manufacturer of the chain, and Penrod.

3. On the fourth day of the trial of this matter, plaintiff settled its claims against Gearench. Gearench's third-party demands for indemnity and/or contribution from Penrod and Columbus-McKennon are now before this court.

4. Though Gearench sold the chain under its own trademark label as its own product, the chain was actually manufactured by Columbus-McKinnon; Gearench simply marketed the chain.

5. Circumstantial evidence at trial established that the chain was defective, i.e., it was unreasonably dangerous to normal use. The evidence also established that this defect in the chain caused it to break causing the fatal accident.

6. Gearench had no knowledge of this defect at the time of the accident and in no way caused or contributed to the chain's defect; Gearench did not abuse the chain in any way.

7. The chain was in normal use at the time the accident occurred.

8. It was not shown by a preponderance of the evidence that Penrod had actual knowledge of the dangerous condition leading to the decedents' deaths or that Penrod was unreasonable in failing to protect the decedents against the alleged danger.

CONCLUSIONS OF LAW

A. *Gearench's Third-Party Demand Against Penrod*

1. Gearench's third-party demand against Penrod for indemnity or contribution is governed by § 905(b) of the Longshore and Harbor Worker's Compensation Act ("LHWCA"), 33 U.S.C. 901, et seq.

2. Under § 905(b), a vessel owner is liable for injuries suffered by longshoremen employed by an independent contractor while aboard its vessel only when the vessel owner 1) has actual knowledge of the dangerous condition affecting the longshoremen, 2) is aware that the independent contractor by whom the longshoremen are employed is unreasonable in failing to protect the longshoremen against such danger, and 3) the vessel owner nonetheless fails to intervene and correct the dangerous condition. *Scindia Steam Navigation Co., Ltd. v. De Los Santos,* 451 U.S. 156 (1981); *Helaire v. Mobil Oil Co.,* 709 F.2d 1031 (5th Cir. 1983).

3. Because Gearench has failed to prove that Penrod had actual knowledge of a dangerous condition leading to the decedents' deaths, and was aware that McBroom was unreasonable in failing to protect its employees from such a condition, Gearench's § 905(b) claim against Penrod must fail.

B. *Gearench's Third-Party Demand Against Columbus-McKinnon.*

4. Because Columbus-McKinnon was the manufacturer of a defective product that caused the decedents' ultimate deaths, it is strictly liable in tort for the damages

arising out of that defective product under either Louisiana, *see Weber v. Fidelity Casualty Ins. Co.*, 259 La. 599, 250 So.2d 754 (1971), or maritime law. *See East River Steamship Corp. v. Transamerica Delaval, Inc.*, ____U.S.____, 54 U.S.L.W. 4649 (1986) (recognizing products liability, including strict liability, as part of general maritime law).

5. Under strict products liability law, the responsibility of a vendor who holds a product out to the public as its own is the same as the manufacturer of such product. *See Chappuis v. Sears, Roebuck & Co.*, 358 So.2d 926, 930 (La. 1978).

6. Where the Sears, Roebuck-type "professional vendor" is not actually responsible for the damages caused by the defective product (i.e., it was not aware the product was defective and in no way caused or contributed to the product's defect), however, it is entitled to indemnity from the actual manufacturer. *Burch v. Sears, Roebuck & Co.*, 320 Pa. Super 444, 467 A.2d 615 (Pa. Super. 1983). This rule should apply in Louisiana as well as maritime strict products liability law.

7. It is well-settled under Louisiana law that the non-manufacturer seller of a defective product is not liable for damages in a products liability action unless he knew or should have known the products sold were defective. *See Jones v. Employer's Mutual Liability Ins. Co.*, 430 So.2d 397 (La. App. 1983); *Harris v. Atlantis Stove Works, Inc.*, 428 So.2d 1040 (La. App.), *writ denied*, 434 So.2d 1196 (La. 1983); *Hudgens v. Interstate Battery System of America, Inc.*, 393 So.2d 940 (La. App. 1981). Moreover, Louisiana law recognizes

a retailer's right of indemnity against the manufacturer. *See Fairburn v. Montgomery Ward & Co., Inc.*, 349 So.2d 1280 (La. App. 1977).

8. It is also now a general principle of products liability law that a non-negligent retailer is entitled to indemnity from the manufacturer of a defective product based upon strict liability in tort. *See* L. Frumer and M. Friedman, 3A *Products Liability* § 44.02[3] [b] & n. 9. (1986) and cases cited therein. This court concludes that this principle of products liability law was incorporated into general maritime law by *East River Steamship Corp., supra. See also Watz v. Zapata Off-shore Co.*, 431 F.2d 100 (5th Cir. 1970).

9. Accordingly, Gearench can recover full indemnity from Columbus-McKinnon for the amount it paid in settlement to plaintiff pursuant to plaintiff's strict products liability claims under either Louisiana or maritime products liability law. It is therefore unnecessary to reach the issue of whether state or maritime law properly governs Gearench's third-party demand against Columbus-McKinnon.

Defendants are directed to prepare a judgment consistent with these findings and conclusions.

Lafayette, Louisiana, July 30, 1986.

/s/ JOHN M. DUHE, JR.
Judge, U. S. District Court

NO. 89-642

IN THE
Supreme Court of the United States

OCTOBER TERM, 1989

COLUMBUS-McKINNON, INC.,
Petitioner

v.

GEARENCH, INC.,
Respondent

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

DAVIDSON, MEAUX, SONNIER
& McELLIGOTT
JEFFREY A. RHOADES
810 S. Buchanan Street
Lafayette, Louisiana 70502

Attorneys for Respondent
Gearench, Inc.

QUESTION PRESENTED FOR REVIEW

Whether a remand for the purpose of amendment of defective allegations of jurisdiction, pursuant to 28 U.S.C. Sec. 1653, can encompass an authorization that the District Court record be supplemented as to jurisdictional facts.

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record, certifies that the following persons and parties have an interest in the outcome of this case:

1. Petitioner, Columbus-McKinnon, Inc.

2. Respondent, Gearench, Inc.

3. Travelers Insurance Company

4. Mission Insurance Company

5. Kenneth G. Engerrand, G. Byron Sims, and Brown, Sims, Wise & White, counsel for Petitioner, Columbus-McKinnon, Inc.

6. Jeffrey A. Rhoades and Davidson, Meaux, Sonnier & McElligott, counsel for Respondent, Gearench, Inc.

Additional Parties below were:

7. Plaintiffs, Bess Caroline Molett, John Dreisch Molett, IV, Pamela H. Landry, Nicholas Ross Landry and Mark James Landry

8. Defendants, Penrod Drilling Company, Marathon LeTourneau, Inc., Armco Steel Company, Superior Derrick Services, Inc., Kulkoni, Inc., and Aetna Life & Casualty Company and/or Aetna Casualty & Surety Company

9. Intervenors and Third-Party Defendants, McBroom Rig Building Services, Inc., The North River Insurance Company and International Surplus Lines Insurance Company

10. Third-Party Defendants, Taisho Marine & Fire Insurance Company, Naniwa Tekko K.K., and K-M International

Jeffrey A. Rhoades per a

JEFFREY A. RHOADES
Attorney for
Gearench, Inc.

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OPINIONS BELOW

Respondent, Gearench, Inc., (Gearench), adopts herewith the statement of opinions below presented in the original Petition for Writ of Certiorari and joins, by way of reference thereto, in the appendices attached to the original Petition for Writ of Certiorari.

JURISDICTION

The jurisdictional statement of petitioner, Columbus-McKinnon, Inc., (Columbus-McKinnon), is adopted herein by way of reference thereto.

STATUTES INVOLVED

The presentation of statutes involved in this matter made by Columbus-McKinnon is in its Petition for Writ of Certiorari and is adopted by way of reference thereto.

STATEMENT OF THE CASE

John Molett, III and Harold E. Landry were killed on January 27, 1983, while engaging in the construction of a derrick on a jack-up barge owned by Penrod Drilling Company.

Various survivors brought wrongful death actions against Penrod and other companies who were either directly or tangentially involved in the accident which resulted in the death of Molett and Landry. Several third party demands were thereafter filed among named defendants seeking indemnity and/or contribution among the defendants.

Following a jury trial on the merits, and prior to the return of the jury verdict, one defendant, Gearench, settled with the plaintiffs while preserving its claim against other defendants, Columbus-McKinnon and Penrod Drilling Company (Penrod) for indemnity and/or contribution. The jury was, therefore, dismissed.

Several weeks after the jury was dismissed, the trial court considered Gearench's claim for indemnity and found Columbus-McKinnon liable to Gearench for the same. The claim for indemnity against Penrod was dismissed.

Columbus-McKinnon appealed the finding of liability for indemnity, nonetheless, the Fifth Circuit found both Gearench and Columbus-McKinnon liable for the plaintiff's injuries, thereby rendering Columbus-McKinnon liable to Gearench for indemnity. The matter was thereafter remanded to the trial court for a finding of whether or not the settlement was reasonable. The trial court determined that the settlement was reasonable.

Columbus-McKinnon retained new counsel who appealed the trial court's ruling a second time, and who raised the issue of subject matter jurisdiction for the first time during the second appeal.

During the extended period of litigation described above, a pre-trial brief, a post-trial brief, an appellate brief and a brief on remand failed entirely to challenge the existence of subject matter jurisdiction. The question of subject matter jurisdiction was also not raised at oral argument on the first appeal to the Fifth Circuit. Only on the second appeal was the matter of the basis of subject matter jurisdiction over Gearench's claim first challenged.

In considering the challenge to jurisdiction the Fifth Circuit found that there was no admiralty jurisdiction in the premises, but remanded once again for the purpose of allowing Gearench to amend defective allegations of diversity jurisdiction and for the record to be supplemented. See, *Molett v. Penrod Drilling Company, et al*, 872 F.2d 1221 (5th Cir. 1989); Appendix to Writ Application p. B-16.

The question as to whether such a remand is proper under 28 U.S.C. 1653 is the sole issue presented by the writ application presently pending before this Court.

ARGUMENT

As this Court is abundantly aware, 28 U.S.C. Section 1653 provides:

> "Defective allegations of jurisdiction may be amended upon terms, in the trial or appellate courts".

Following this clear mandate, the Fifth Circuit in *Molett*, 872 F.2d 1221, 1228, stated the following:

> "Where, as here, jurisdiction is not clear from the record, but there is some reason to believe that jurisdiction exists, the Court may remand the cause to the District Court for amendment of the allegations and for the record to be supplemented."

Counsel for Columbus-McKinnon argues that the mandate of the panel below is a novel one; nonetheless, a stay of that mandate pending presentation of this issue to the United States Supreme Court was denied, apparently signifying the Fifth Circuit's clear disagreement with such an argument.

The jurisprudence which supports the action of the Fifth Circuit panel on the issue before this Court is clear.

In *Towns v. Country Quality Meats, Inc.*, 610 F.2d 313 (5th Cir. 1980), plaintiffs, who brought causes of action for damages in tort and in contact arising out of the purchase and consumption of poisoned meat, were allowed to allege by way of amendment, principal place of businesses of corporate defendants and thereby cure defective allegations of diversity jurisdiction. See, also, *Neely v. Banker's Trust Company*, 757 F.2d 621 (5th Cir. 1985).

No argument can be made that granting a right to amend pleadings to cure defective jurisdictional allegations is not freely and liberally extended.

Furthermore, record supplementation in support of amended allegations is also a matter well founded in the jurisprudence.

In *District of Columbia, ex rel American Combustion, Inc. v. Transamerica, Inc.*, 797 F.2d 1041 (D.C. Cir. 1981), the Court indicated that if an amendment of jurisdictional allegations at the appellate level is challenged by opposing counsel, then remand for supplementing of the record would occur. See, also, *Stockman v. LaCroix*, 790 F.2d 584 (2d Cir. 1986), and *Sarnoff v. American Home Products Corporation*, 798 F.2d 1075 (2d Cir. 1986). The above circuit's decisions have been clearly adopted by the Fifth Circuit, as well, as is evidenced by its mandate in this case.

In prior proceedings, counsel for Columbus-McKinnon argued that Gearench should be denied the right to offer such supplemental proof because Gearench had continual knowledge that its allegations of jurisdiction were challenged. To this argument, the comments of the panel below are appropriate.

> "Gearench had no notice, nor should it be charged with any notice, of a defect in jurisdiction prior to this second appeal. In the original action, plaintiff's alleged not only diversity jurisdiction, but also admiralty jurisdiction based upon Section 905(b) and general maritime negligence claims. The diversity of the parties was never materially at issue. Columbus-McKinnon concedes that as a part of the pre-trial order, "the parties stipulated that the jurisdiction and venue

> of the case were based on: General maritime law, pendent state claims asserted by plaintiffs versus various defendants." Our previous discussion of the confusion in our own admiralty precedents is enough to demonstrate that it was not unreasonable for Gearench to have assumed that admiralty jurisdiction existed at least over plaintiff's claims against Penrod."
>
> Furthermore, Gearench was a defendant to the original action. As such, it had no burden to prove diversity between the original parties or between it and its third party defendants assuming ancilliary jurisdiction existed. Our decision in *Molett I* dealt only with the lack of admiralty jurisdiction over Gearench's cross claim, and the issue was really what law would apply to that claim. As we have stated earlier, that is not dispositive of admiralty jurisdiction over plaintiff's claims against Penrod. Our decision that focused on what law to apply to the indemnity claim should not necessarily have alerted Gearench that the jurisdiction of the Court itself was at issue. Indeed, on remand, Columbus-McKinnon did not challenge the jurisdiction of the district court. Only now is there argument that admiralty jurisdiction might not exist and that the allegations of diversity are defective." *Molett*, 872 F.2d 1221, 1228.

As a final challenge to the action taken by the panel in this case, counsel for Columbus-McKinnon cites this Court to the *Newman-Green, Inc. v. Alfonzo Larrain*, _____ U.S. _____ . 109 S.Ct. 2218, 104 L.Ed.2d 893 (1989), a decision wherein this Court construed the ambit of 28 U.S.C. Sec. 1653.

Counsel for Columbus-McKinnon attaches a meaning to the decision which is far beyond the scope intended or contemplated by the decision. Counsel for Columbus-McKinnon equates the concept of defective jurisdictional facts to the concept of an incomplete record on the jurisdictional issue.

In *Newman-Green*, this Court considered the applicability of 28 U.S.C. Sec. 1653 to a situation wherein the complainant, Newman-Green, Inc., brought a state law contract action against a Venezuelan corporation, four Venezuelan citizens, and an American citizen domiciled in Venezuela. Because the American citizen was a citizen of the United States, but not domiciled in any state, the Court of Appeals held that there was no complete diversity under either 28 U.S.C. 1332(a)(2) or (a)(3). On rehearing, en banc, the Seventh Circuit remanded the cause to the trial court to determine whether it would allow dismissal of the non-diverse party. Thereafter, a petition for writ of certiorari was granted *for the sole purpose of determining whether appellate courts could dismiss "jurisdictional spoilers" and preserve diversity*. *Newman-Green*, 109 S.Ct. at 2222. [emphasis added].

In discussing the issue of the scope of 28 U.S.C. Sec. 1653, the Court indicated as follows:

> "Title 28 U.S.C. Section 1653, enacted as part of the revision of the Judicial Code in 1948, provides that, 'defective allegations of jurisdiction may be amended, upon terms, in the trial or appellate courts'. At first blush, the language of this provision appears to cover the situation here, where the complaint is amended to drop a non-diverse party in order to preserve statutory jurisdiction. But Section 1653 speaks of the amendment

> of 'allegations of jurisdiction' which suggests that it addresses only incorrect statements about jurisdiction that actually exists, and not defects in the jurisdictional facts themselves. Under this reading of the statute, which we believe is correct, Section 1653 would apply if Bettison were, in fact, domiciled in a state other than Illinois, or was, in fact, not a United States citizen, but the complaint did not so allege. It does not apply to the instant situation, where diversity jurisdiction does not, in fact, exist.
>
> 'This interpretation of Section 1653 is consistent with the language of its predecessor statute, enacted in 1915, which expressly limited jurisdictional amendments to cases in which diversity jurisdiction "in fact existed at the time the suit was brought or removed, though defectively alleged'." *Newman-Green*, 109 S.Ct. at 2222.

In spite of discussions regarding the scope of Section 1653, this Court was required to resolve the sole issue of whether or not an appellate court had the authority to dismiss a dispensable non-diverse party. The Supreme Court held that it did. Ironically, citing deference to longstanding jurisprudence, this Court held that which seemingly would allow amendment to jurisdictional facts. Gearench does not seek such broad relief.

No interpretation or stretch of the imagination can construe the holding of *Newman-Green*, in the context of its facts, to prohibit the appellate court from remanding pursuant to 28 U.S.C. Section 1653 for amendment and record supplementation, provided that the same merely bears out jurisdictional facts which always existed.

Concluding, in order to find support for his position in *Newman-Green*, counsel for Columbus-McKinnon must equate defective jurisdictional facts with an incomplete record; it is urged by Gearench that to do so gives, indeed, a novel interpretation to 28 U.S.C. Sec. 1653 and its attendant jurisprudence. Counsel for Gearench intends, by way of amendment and record supplementation to do no more than present to the Court jurisdictional facts which have existed since the inception of this litigation. No court is being asked to create or accept jurisdiction by curing defects in jurisdictional facts.

In as much as the mandate of the Fifth Circuit in this matter was not stayed, counsel for Gearench has prepared amended pleadings and gathered the necessary evidence to conclusively show that complete diversity does and has always existed herein. For the foregoing reasons, therefore, the matter pending before this Court is in complete conformity with 28 U.S.C. Sec. 1653 and its longstanding historical interpretation by the Courts. The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

Jeffrey A. Rhoades per cc
JEFFREY A. RHOADES
810 S. Buchanan Street
P. O. Drawer 2908
Lafayette, Louisiana 70502

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing has this day been forwarded to all counsel of record by placing same in the United States mail.

Lafayette, Louisiana this 15th day of November, 1989.

Jeffrey A. Rhoades per ca

JEFFREY A. RHOADES

NO. 89-642

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

COLUMBUS-McKINNON, INC.,
Petitioner

v.

GEARENCH, INC.,
Respondent

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

KENNETH G. ENGERRAND
G. BYRON SIMS
2000 Post Oak Blvd.
Suite 2200
Houston, Texas 77056-4496

Attorneys for Petitioner
Columbus-McKinnon, Inc.

Of Counsel:

BROWN, SIMS, WISE & WHITE

Alpha Law Brief Co., Inc. — 8748 Westpark — Houston, Texas 77063 — 789-2000

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REPLY TO BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The argument of Respondent Gearench, Inc., in its Brief in Opposition, emphasizes the error of the Court of Appeals. Gearench states that after the second decision of the Court of Appeals, its counsel has "prepared amended pleadings and gathered the necessary evidence to conclusively show that complete diversity does and has always existed herein." (Gearench's Brief at 9). Gearench had the burden of introducing evidence of jurisdiction at trial, however, not after the second appeal of the case. In fact, this Court has specifically rejected similar attempts on appeal to supplement the record in order to avoid dismissal on jurisdictional grounds. *Henneford v. Northern Pacific Ry.*, 303 U.S. 17, 19 (1938).

Gearench attempts to extend the language of 28 U.S.C. § 1653 so as to permit not only amendment of defective allegations of jurisdiction, but also introduction of the proof that Gearench should have proffered at trial. Gearench can cite no case from this Court which permits such an interpretation of 28 U.S.C. § 1653 and, in fact, both the language of the Statute and its recent interpretation by this court in *Newman Green, Inc. v. Alfonzo-Larrain*, 109 S. Ct. 2218 (1989) are to the contrary. The Statute permits the parties only to rectify defective *allegations* of jurisdiction, not a defective record with insufficient proof.

Gearench's argument turns on its head the rule that parties who fail to establish the facts supporting their

claim must suffer a dismissal. Gearench contends that it is a "novel" interpretation of the language of 28 U.S.C. § 1653 (permitting amendment of "defective allegations of jurisdiction") to construe it as allowing amendment of pleadings but not introduction of supplemental evidence. Instead, Gearench argues the Statute permits introduction of evidence to support a new theory of jurisdiction on remand of the case. It is not novel to insist that the party bearing the burden of proof introduce evidence at trial.

What is novel is for a party to try a case on one theory, and then, after losing on that ground, request a remand to plead and prove a different theory. Gearench was content to allow the case to be tried based on assertions of admiralty jurisdiction, although the existence of admiralty jurisdiction was stipulated to be a contested issue of law. After losing on that ground, Gearench now seeks to plead and prove a new basis for jurisdiction. It would be novel indeed to interpret a statute permitting amendment of defective allegations of jurisdiction as authorizing a retrial of the case on a different theory.

This Court has repeatedly ruled that the failure to introduce evidence of jurisdiction mandates a dismissal of the case. *McNutt v. General Motors Acceptance Corp.*, 298 U.S. 178 (1936); *KVOS, Inc. v. Associated Press*, 299 U.S. 269 (1936); *North Pacific Steamship Co. v. Soley*, 257 U.S. 216 (1921). Gearench does not cite these cases or address their holdings. Gearench merely cites the comments of the panel of the Court of Appeals that "Gearench had no notice" of a defect in jurisdiction prior to the second appeal. The fact that jurisdiction was contested in every answer, including Gearench's

answer, and the fact that the pretrial stipulations stated that admiralty jurisdiction was a contested issue, were all the notice necessary under *McNutt, KVOS,* and *Soley* to require that Gearench introduce evidence of jurisdiction or suffer a dismissal. Consequently, jurisdiction must be determined on "the facts presented." *McNutt,* 298 U.S. at 189; *Soley,* 257 U.S. at 221.

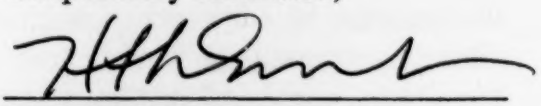
In addressing the failure to establish jurisdictional facts, this Court has dealt with the precise situation that exists in the case at bar and has rejected the argument made by Gearench in its Brief. In *Henneford v. Northern Pacific Ry.,* 303 U.S. 17 (1938), it appeared from the complaint that there was no jurisdiction because the amount in controversy was $2,044.08. The Appellee moved for leave to file an affidavit to supplement the record to show that the amount in controversy *in fact* exceeded the amount necessary to establish jurisdiction. In denying the motion, the Court stated: "The Court is of the opinion that the jurisdiction of the District Court should be tested by the case made by the bill of complaint." *Id.* at 19. The district court judgment in favor of the Appellee was reversed and remanded with directions to dismiss the case for want of jurisdiction. *Id.* Similarly, Gearench now claims to have "gathered the necessary evidence to conclusively show that complete diversity does and has always existed herein." (Gearench's Brief at 9). As in *Henneford,* it is too late to introduce supplemental evidence to establish jurisdiction.

In conclusion, the jurisdiction of the federal district court must "affirmatively appear in the record." *Mansfield C. & L.M. Ry. v. Swan,* 111 U.S. 379, 382 (1884). It is too late on appeal to introduce the evidence necessary

to establish jurisdiction. This is not a case where an amendment is being made to conform the pleadings to the evidence introduced at trial. Rather, it is a case in which Gearench seeks to amend pleadings to conform to new evidence while simultaneously introducing new evidence to conform to the amended pleadings. It is an "inflexible" rule in this circumstance that the court dismiss the case, *id.*, and the Court of Appeals erred in remanding the case to introduce evidence of a new basis for jurisdiction. *Henneford,* 303 U.S. at 19.

Wherefore, Columbus-McKinnon respectfully prays that this Honorable Court grant the petition for a writ of certiorari.

Respectfully submitted,



KENNETH G. ENGERRAND
G. BYRON SIMS
2000 Post Oak Blvd.
Suite 2200
Houston, Texas 77056-4496

Attorneys for Petitioner
Columbus-McKinnon, Inc.

Of Counsel:

BROWN, SIMS, WISE & WHITE

CERTIFICATE OF SERVICE

I hereby certify that three true and correct copies of the above and foregoing REPLY TO BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT have been forwarded to Mr. Jeffrey A. Rhodes by United States Mail on this the 22 day of November, 1989.

KENNETH G. ENGERRAND